H.R. _____, A DISCUSSION DRAFT ON WIRELESS CONSUMER PROTECTION AND COMMUNITY BROADBAND EMPOWERMENT

HEARING

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

February 27, 2008

Serial No. 110–95

Printed for the use of the Committee on Energy and Commerce

energycommerce.house.gov

U.S. GOVERNMENT PRINTING OFFICE

49–802 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
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H.R. _____, A DISCUSSION DRAFT ON WIRELESS CONSUMER PROTECTION AND COMMUNITY BROADBAND EMPOWERMENT

WEDNESDAY, FEBRUARY 27, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET,
COMMITTEE ON ENERGY AND COMMERCE,
Washington, DC.

The subcommittee met, pursuant to call, at 10:10 a.m., in room 2322 of the Rayburn House Office Building, Hon. Edward J. Markey (chairman) presiding.

Members present: Representatives Markey, Doyle, Harman, Gonzalez, Inslee, Boucher, Stupak, Green, Solis, Stearns, Upton, Shimkus, Pickering, Fossella, Radanovich, Mack, Walden, Ferguson, Barton (ex officio), and Buyer.

Staff present: Amy Levine, Tim Powderly, Colin Crowell, David Vogel, Neil Fried, Courtney Reinhard, and Garrett Golding.

OPENING STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF MASSACHUSETTS

Mr. MARKEY. Good morning. Today the subcommittee is holding a legislative hearing on draft legislation addressing wireless issues and community broadband services. This legislation is currently in discussion draft form in order to facilitate input from consumers, from industry, and other interested parties for improvements and clarifications. At this point, I would like to enter into the record letters from the National Association of Regulatory Utility Commissioners, as well as a coalition of telephone trade associations.

[The information follows:]

N A R U C
National Association of Regulatory Utility Commissioners

Marsha H. Smith, *President*
Idaho Public Utilities Commission

Frederick F. Butler, *First Vice President*
New Jersey Board of Public Utilities

David C. Coen, *Second Vice President*
Vermont Public Service Board

Wendell F. Holland, *Treasurer*
Pennsylvania Public Utility Commission

Charles D. Gray, *Executive Director*
Washington, DC Office

February 27, 2008

The Honorable Edward J. Markey
Chairman
Subcommittee on Telecommunications
and the Internet
US House of Representatives
Washington, D.C. 20515

The Honorable Cliff Stearns
Ranking Member
Subcommittee on Telecommunications
and the Internet
US House of Representatives
Washington, D.C. 20515

RE: The "Wireless Consumer Protection and Community Broadband Empowerment Act of 2008" {Discussion Draft}

Dear Chairman Markey and Ranking Member Stearns:

On behalf of the National Association of Regulatory Utility Commissioners (NARUC), we appreciate the opportunity to submit these comments on the *"Wireless Consumer Protection and Community Broadband Empowerment Act of 2008"* discussion draft.

NARUC represents the interests of commissions in each State charged with the oversight of, among other things, telecommunications carriers. Your States' commissioners share your commitment to assure each of your constituents receives the benefits of competitive markets and new services. NARUC's members have a close alignment of interests with each of you on policy goals important to your State, as well as keen insight to what is actually happening back home.

Experience and common sense suggest a partnership with State authorities is key to assuring effective federal legislation to protect wireless consumers. As described in more detail below – we agree with certain elements of Sections 101 & 104 of the discussion draft and strongly endorse all of Section 107.

We also commend each of you and the committee for considering legislation and holding this hearing to examine protecting wireless consumers – a goal and responsibility States share with Congress. We believe it is appropriate for Congress to address these issues together with States at this time.

Penetration Intensifies, and – in Many Areas, Competition Flourishes - but Problems Remain

Currently, as a matter of federal law, States retain jurisdiction over "other terms and conditions of wireless service."[1] This means States can – *when circumstances warrant* – step in to handle carrier abuses. Still, in the face of this potential oversight, the wireless industry, by any measure, remains wildly successful. To date, we believe this dual jurisdictional model has served the wireless industry quite well, demonstrated by its rapid growth over the past 15 years.

According to CTIA, The Wireless Association, over 250 million Americans now subscribe to a cellular-phone service. Factored against the latest U.S. Census Population figures[2] that places the penetration rate at just over 82 percent. In just the last ten years, that number has more than quadrupled from 55 million subscribers in 1997. Mobility along with improved call quality and new functions offered by wireless carriers make this service attractive to consumers and is leading an increasing percentage to "cut the cord" and discontinue wireline phone services. This increase in consumer reliance solely on wireless is a testament to continued improvements in service coverage, pricing in various packages, and reliability.

According to a February 2008 Federal Communications Commission report, available at <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-28A1.pdf>, competitive options abound. The FCC's analysis indicates that (1) 280 million people, or 99.8 percent of the U.S. population, have access to one or more different operators offering mobile telephone service, (2) more than 95 percent of the U.S. population lives in areas with at least three mobile telephone operators competing to offer service, and (3) more than half of the U.S. population lives in areas with at least five competing operators.

Unfortunately, problems remain.[3] Data from entities as diverse as State Attorneys General and the Better Business Bureau[4] indicate that complaints about wireless telephone

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[1] Under 47 U.S. C. § 332 (1993), State authority is broad. Though States may not regulate wireless "rates" without first getting the FCC's permission, they can address "other terms and conditions" of service, which include "customer billing information and practices and billing disputes and other consumer protection matters . . .siting issues . . .transfers of control; the bundling of services and equipment; and . . .such other matters as fall within a state's lawful authority." H.R. Rep. No. 111, 103rd Cong., 1st Sess. 260 at 261-2 (1993).

[2] See *U.S. Census Population Clock*, available at <http://www.census.gov/main/www/popclock.html>.

[3] See, e.g., (1) ***Sprint Nextel hit with class action Lawsuit - claims carrier illegally extended contacts*** (Jeffrey Silva) RCR Wireless News Feb 7, 2008 Sprint . . . has been hit with a class action . . . alleging [it] is defrauding wireless consumers . . . "by extending consumers' contracts for up to two years without providing adequate notice or obtaining meaningful consent . . . when consumers made small changes to their . . . service, such as adding extra minutes or purchasing a new telephone; when they responded to solicitations . . . for additional products . . . and when the consumer received 'courtesy discounts'" Story at <http://www.rcrnews.com/apps/pbcs.dll/article?AID=/20080207/FREE/950510909/1002/FREE>. (2) ***Cramming your phone bill***, (Bennett Hall) Mid-Valley, Jan 5, 2008 ("[B]ills . . . keep getting longer and more complicated. With pages of line items detailing various taxes, service charges, option packages and access fees, they can be extremely confusing. And that, say consumer advocates, has opened the doors for abuse . . . [m]any of the latest cramming scams target smart phones and other wireless devices," (3) ***Conn. Lawmakers Want to Fix Cell Charges*** (Susan Haigh) AP, Hartford, CT. Feb 7, 2008 ("[T]he concern is legitimate, but the question is whether state law is pre-empted," [the State AG] said." Story at <http://www.chron.com/disp/story.mpl/ap/fn/5523157.html>,.

[4] The Council of Better Business Bureaus (CBBB) began tracking cell phone complaints in 1997. Between 2001 and 2002 cell phone complaints jumped to the top of the most-complained about business. In 2003, it dropped only slightly to number two and in 2004 and 2005 regained the number one position. In 2004, CBBB attempted to determine why complaints had risen so rapidly and found the greatest source of complaints fell into three categories: complaints about billing; complaints about the quality of customer service; and complaints about misrepresentation or miscommunication by sales or customer service personnel.

service and supplies remain among the top, if not the top, of complaints received within recent years. Indeed, just last month, the January 2008 issue of Consumer Reports published its Annual Survey of Cell-Phone Service, arguing that "cell-phone service seems to stubbornly resist improvement." The survey of more than 47,000 readers in 20 major metropolitan areas found that fewer than half of respondents were completely or very satisfied. For the sixth year in a row, cell service remains among the lower-rated services that Consumer Reports rates.[5]

Market Forces Cannot Correct all Consumer Abuses or Maintain Public Safety Policy Initiatives

History, economics, and common sense suggest there are some problems market forces by themselves simply cannot be relied upon to correct. Also, there are some social policy imperatives – both federal and State – that market forces either will not address, or will inject unacceptable delay in attainment of the policy objective.

In the first category are problems that result from practices that actually enhance a particular market participant's profits. The classic example is slamming. State and federal rules banning the practice have been in place for over 10 years – but complaints continue. Privacy concerns, as well as misleading billing[6] are other areas where profit motive alone may not provide adequate incentives for responsible carrier practice. Of course, no one can credibly claim that market forces can ever deter criminal or fraudulent activity.

In the second category are important public policy objectives that are implemented through State and federal activities. Such programs include State and federal universal service programs, State and federal emergency communications initiatives, State and federal critical infrastructure programs, State and federal rules limiting abrupt disconnection of essential services without notice, etc. Here too, history teaches that unaided, the market will not vindicate all these objectives, or, as illustrated by the FCC's 2005 VoIP E911 order, may inject an unacceptable delay to reach what policy-makers deem to be a minimally acceptable result.[7]

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[5] The 2008 Consumer Reports survey results also show some bright spots. Last fall, all the rated service providers pledged to join Verizon by prorating their $150-$200 early termination fees. Others said they will join Alltel and T-Mobile and stop imposing mandatory contract extensions when consumers make minor changes to service plans. See, *Best cell phone deals: Get the most satisfaction and the least grief. Some 47,000 readers tell you how,* Consumers' Reports (Jan 2008), at <http://www.consumerreports.org/cro/electronics-computers/phones-mobile-devices/phones/cell-phone-service-providers/cell-phone-service-1-08/overview/cell-service-ov.htm>.

[6] The FCC received over 19,000 comments from consumers in response to a NASUCA petition for a declaratory ruling on billing clarity. The FCC acknowledges in its March 2005 order in that docket, that the bulk of telecommunications consumer complaints received by the Commission involve carriers' bills and charges. See, *In the Matter of Truth-in-Billing and Billing Format,* CC Docket No. 98-170, *National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing,* CG Docket 04-208 "Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking," (rel. March 18, 2005). [70 Fed Reg. 29979 May 25, 2005].

[7] In June 2005, the FCC decided "[a]lthough the Commission is committed to allowing these services to evolve without undue regulation. . . it is critically important to impose E911 obligations on interconnected VoIP providers and to set firm but realistic target deadlines for implementation." This order was released about a year after the FCC preempted a State order for requiring essentially the same thing in an order that cited extensively industry efforts to voluntarily supply E911 Service. See, *In the Matters of IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers,* WC Docket 04-36, WC Docket 05-196 "First Report and Order", (rel. June 3, 2005) at ¶¶ 4-5 available at <http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-116A1.doc>.

Partnership - not Preemption[8]

States are almost always the first to provide relief and the bulk of enforcement when new abuses emerge, e.g., slamming, cramming or mislabeling of simple business expenses as "regulatory charges." Often State efforts beat federal counterparts by one to three years. Sometimes the gap is longer.[9] States are closest to our citizens and our commissions or Attorneys General feel a stronger urgency to act quickly. Moreover, our proceedings and rulemakings generally are finished more quickly than those at the FCC.

Whenever abuses arise the law of unintended consequences should NOT be construed to work against consumers. To assure needed State flexibility, federal rules should be "[a] floor, not a ceiling," as "...blanket preemption on consumer affairs will restrict consumer redress in the future." Moreover, "...consumers should NOT have to wait for federal rulemaking every time a new issue arises." In some cases, federal rules are necessary and appropriate. Indeed, NARUC does endorse federal rules from time to time.[10]

However, the federal government will *always* lack the manpower to help *all* consumers in *every* State. In many cases, whatever assistance they may provide will be complicated by distance and time zones. As the FCC has acknowledged in some contexts, this means that even where federal minimum standards may be appropriate, State/local governments must be allowed to enforce the federal standards and adopt more specific standards where needed.[11]

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[8] See August 2, 2006 *Resolution on State Jurisdiction over Wireless Industry.* Available at <http://www.naruc.org/Resolutions/TC-1_StateJurisdictiononWireless0706.pdf>.)

[9] For example, by the time the Federal government got around to establishing a national "do-not-call" register, on June 27, 2003 <http://www.ftc.gov/os/2003/01/tsrfrn.pdf>, at least nine States had already established State do-not-call registries. On the public policy front similar gaps between State and federal action to address issues exist. For example, in 1976, South Dakota became the first State to offer a Statewide Deaf Relay program with State appropriated funds. Other States started programs. In 1987, California began the first round-the-clock relay program. That same year NARUC petitioned the FCC to conduct a further notice of inquiry on federal relay services. It was 1990 before a national relay service was sanctioned by Congressional action. (cite) Compare, July 2007 *Testimony of North Dakota Commissioner Clark before the House Subcommittee on Telecommunications and the Internet*, arguing NARUC believes federal standards for consumer protection "may be one way to address carrier concerns over potentially conflicting State regulations. After all, State regulators also want to ensure that compliance costs are minimized so that investment dollars can be focused on providing new service to consumers. However, we also want to be clear that federal standards must be accompanied by State enforcement. Experience has taught us that relying solely on the federal government for enforcement of a mass market like this would be folly. Take for example, the (earlier referenced) Do-Not-Call List experience. While both States and the federal government have enacted these laws, in practice, enforcement has fallen overwhelmingly to States, in fact, almost exclusively. For illustrative purposes, consider this: North Dakota is a State of only about 640,000 people. In the first 2 ½ years of its strict State Do-Not-Call law, the State Attorney General has enforced 53 settlements, totaling over $64,000, and issued 7 cease and desist orders just in his State alone. In approximately the same time frame, the entire federal government, despite receiving over one million complaints, [had] only issued 6 fines and filed 14 lawsuits. Even more importantly from the consumer's viewpoint, telemarketers were quick to exploit a patchwork of loopholes and "workarounds" to the federal rules and the calls kept coming. It fell to a handful of States to say that "no means no". It is not that federal officials don't care, it is just that there is simply no way they could effectively respond to individual complaints across a nation this large unless States are full partners in enforcement."

[10] See, e.g., NARUC's August 2, 2006 *Resolution Supporting Federal Legislation To Combat Caller Identification Spoofing*, available at <http://www.naruc.org/Resolutions/TC-4_CallerIDSpoofing0706.pdf>. See also the July 2005 *NARUC Legislative Task Force Report on Federalism and Telecom*, available under Technical Resources link at <http://www.naruc.org/committees.cfm?c=53>.

[11] The FCC has frequently recognized States' core competency with respect to consumer protection. For example, a May 3, 2000 FCC order recognized, at ¶¶ 24-6, the clear benefits of leveraged enforcement, noting:

Certainly, there is no rationale for Congress to limit its constituents' access to State remedies or penalties for federally defined inappropriate or abusive conduct. Without State assistance, consumers are left to small-print "boilerplate" contracts, apt to spend hours on the phone sorting out disputes, even missing work to travel to a providers' store to wait in line for assistance. As consumers increasingly come to rely on wireless and other technologies to replace traditional phone service, their expectations and need for responsive consumer protection will most likely increase.

Section-by-Section NARUC Comments on
"The Wireless Consumer Protection & Community Broadband Empowerment Act of 2008"

NARUC has not passed a resolution specifically addressing every issue raised by this discussion draft. However, a number of our existing resolutions are relevant to some of the current provisions. As noted earlier, we agree with certain elements of Section 101 & 104 of the discussion draft and strongly endorse Section 107.

SECTION 101 - WIRELESS SERVICE PLAN DISCLOSURE

Section 101(a) requires the FCC to promulgate regulations requiring each commercial mobile service provider to describe the terms and charge associated with any wireless service plan in a clear, plain, and conspicuous manner. NARUC has long been a supporter of such "Truth-in-Billing" (TIB) rules and passed two resolutions in July 2004 on the topic. The first *Resolution Concerning Current Telecommunications Policies*[12] adopted a statement of NARUC's *Current Telecommunications Policies*, which was amended somewhat in other areas

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> Joint State-federal activities have been very effective in protecting consumers against *various types* of telecommunications fraud. It is imperative that the States and the FCC continue to cooperate, and expand their interaction, in order to eradicate slamming . . .We agree with NARUC that the States are particularly well-equipped to handle complaints because they are close to the consumers and familiar with carrier trends in their region. As NARUC describes, establishing the State commissions as the primary administrators of slamming liability issues will ensure that "consumers have realistic access to the full panoply of relief options available under both State and federal law." . . .Moreover, State commissions have extensive experience in handling and resolving consumer complaints against carriers, particularly those involving slamming. . . . we conclude that State commissions have the ability and desire to provide prompt and appropriate resolution of slamming disputes between consumers and carriers in a manner consistent with the rules adopted by this Commission. In most situations, State commissions will be able to provide consumers with a single point of contact for each State, thereby enabling slammed consumers to rectify their situations, receive refunds, and get appropriate relief with one phone call. State commissions also will be able to provide consumers and carriers with timely processing of slamming disputes. Finally, but of critical importance, States will provide a neutral forum for the resolution of slamming disputes. [emphasis added] *In the Matter of Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers,* CC Docket No. 94-129, FIRST ORDER ON RECONSIDERATION, 15 FCC Rcd 8158 (Rel. April 13, 2000).

[12] Available at <http://www.naruc.org/Resolutions/telecompolicies0704.pdf> Compare, NARUC's July 30, 2003 *Resolution Adopting Wireless Best Practices* – which most observers credit with instigating the subsequent CTIA guidelines embodied in its voluntary "code of conduct." Available at <http://www.naruc.org/Resolutions/bestpractices.pdf>.

in November of 2004 that outlined notice and TIB principles.[13] A separate resolution, passed at the same meeting, captioned: *Resolution Concerning the Truth-In-Billing Petition filed at the Federal Communications Commission by the National Association of State Utility Consumer Advocates*[14] states that

> ". . . a clear, full and meaningful disclosure of all applicable surcharges should be made at the time of execution of the service agreement between the company and the consumer as such disclosure is one of the keys to empowering the consumer to make an informed decision regarding its choice."

Section 101(a)(1) (A)- (E) requires a description of the terms associated with the plan being purchased by the consumer – including the term of the plan, the length of any trial period, the minutes included and how they will be calculated, the existence of any early termination fees, service initiation fees, or other non-recurring fees. Section 101(a)(2) (A)-(E) requires a description of any charges associated with the plan including the amount.

All of these disclosures appear consistent with NARUC positions that all "surcharges" be disclosed at the time of execution of the service agreement, as well as the *Current Telecommunications Policy's* Section 10.2 mandate that consumers "be informed of their service options, the functional standards for those services, and the process for resolving service problems." They are also consistent with Section 10.5 of the same document's notice requirements for federal and State regulators, albeit discussed with respect to "interexchange services," that "newly-subscribed" customers have a "right to receive" the following:

> *A description of each product or service to which the customer has subscribed;*
> *All rates and charges as they will appear on the bill, including any minimum charges or recurring charges;*
> *Itemization of any charges that may be imposed on the customer, including charges for late payments and returned checks;*
> *Minimum contract service terms and any fees for early termination;*
> *Advance payments requirements and refund policy;*
> *Any required change in telephone number; [and]*
> *Instructions on canceling service for customers who have not signed a written contract for service.*

SECTION 102 - EARLY TERMINATION FEES & SECTION 103 - COVERAGE MAPS

Although NARUC's July 2007 resolution urges the FCC to open a rulemaking to examine the basis for early termination fees (ETF),[15] and a July 2003 resolution, suggests

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[13] See, NARUC's *Current Telecommunications Policies* at pp. 11-12, Sections 10.2 – 10.5 specifically addressing proper advance disclosures to consumers and necessary billing clarity. Available at http://www.naruc.org/Resolutions/04%201117%20CURRENT%20NARUC%20POLICY%20.pdf>.

[14] Available at <http://www.naruc.org/Resolutions/truthinbilling0704.pdf>.

[15] See *Resolution Calling on the FCC to Reexamine Wireless Carriers' Early Termination Fees* available at <http://www.naruc.org/Resolutions/CA-1%20Resolution%20Calling%20on%20the%20FCC%20to%20Reexamine%20Wireless%20Carriers%20Early%20Termination%20Fee_July07.pdf>.

voluntary provision of maps, neither resolution addresses the specific provisions of Sections 102 and 103.[16]

SECTION 104 - BILLING POLICIES

Section 104 of the discussion draft requires FCC rules to prohibit providers from separately listing any charge on the bill other than charges [i] for services provided to a subscriber, nonpayment, early termination, other lawful penalty, federal, State, or local sales/excise taxes; or [ii] expressly authorized by a Federal, State, or local statute, rule, or order to appear on a subscriber's billing statement as a separately stated charge.

It also requires each carrier to ensure each bill is clearly organized, describes in plain language the products and services for which a charge was imposed, and conforms to FCC required formatting standards.

Finally, it requires "*any charge specifically required by a federal, State, or local statute, rule, regulation, or order to be collected from a subscriber be listed in a separate section of each bill sent to a subscriber and itemized separately in clear and plain language*" and prohibits "*any charge which is not required to be collected from a subscriber under a federal, State, or local statute, rule, regulation, or order from being included in the section of the bill described earlier.*"

NARUC generally supports the parts of Section 104 summarized above. Section 10.3 of the July 2004 version of NARUC's *Current Telecommunications Policies* agrees with this section noting that " . . . consumer telecommunications bills should be clear. NARUC supports ensuring that consumers can tell quickly and easily from their bills (a) what services they are receiving; (b) from whom they are receiving these services; and (c) how much they are paying."[17] The earlier cited July 2004 NARUC "Truth in Billing" resolution[18] is also on point – as it specifically:

- "[O]pposes the imposition of monthly surcharges that are not mandated or specifically authorized by law or regulation to be passed on to the consumer;"
- Suggests "a clear, full and meaningful disclosure of all applicable surcharges should be made at the time of execution of the service agreement between the company and the consumer;"
- Suggests "monthly invoices should separate charges that law or regulation require to be passed through to consumers from those charges that are not mandated, but are specifically authorized to be passed through to consumers."

Government-mandated charges should be listed in a section of the customer's bill that is distinct and separate from other areas listing monthly recurring charges, usage-based charges, and other charges that carriers impose at their discretion. Defining government "mandated" charges as those carriers are "specifically required" to be collected from the subscriber conforms

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[16] See *Resolution Adopting Wireless Best Practices* available at <http://www.naruc.org/Resolutions/bestpractices.pdf>

[17] See, NARUC's "Current Telecommunications Policies" available at http://www.naruc.org/Resolutions/04%201117%20CURRENT%20NARUC%20POLICY%20.pdf.

[18] Available at <http://www.naruc.org/Resolutions/truthinbilling0704.pdf>.

its commonly understood, and logical, meaning. Mandatory means "[r]equired by or as if by mandate; obligatory."[19] Average consumers understand this term quite well. Customer confusion is the inevitable result of adopting any definition that conflates "mandatory" with "permissive" charges. In addition, this approach should deter carriers from blaming the government for charges that they are not required to pass through to customers thereby enhancing competition.[20]

SECTION 105 & 106

Neither section is the subject of a NARUC resolution that specifically addresses the proposed statutory text.

SECTION 107(b) - ENFORCEMENT BY THE STATES

NARUC strongly endorses Section 107(b).

There is no logical reason to take State consumer cops off the beat. This bill does not do so.

If the "federally defined" behavior is bad, having more people working to implement the law both increases deterrence of bad behavior and undoubtedly provides more of your constituents with relief. In any case, the federal government will *always* lack the manpower to help *all* consumers in *every* State. Moreover, many times, whatever assistance the federal government can provide will be complicated by distance and time zones. (Cf., footnote 9, supra) Assuming the State legislature has given the State entity proper authorization, this section makes clear that States remain free to enforce up to the national federal standards.

There is no logical reason to demand that States that choose to enforce up to the federal standard use a particular agency or process. In effect, there is no reason to handcuff the cops on the beat. This bill does not do so.

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[19] See, *The American Heritage Dictionary: Second College Edition* 761 (1985); see also *Webster's II New College Dictionary* 664 (1995); *Oxford American Dictionary* 403 (1980).

[20] In its original Truth-in-Billing order, the FCC recognized that labeling a line-item charge "mandated" when they are not makes it more difficult for consumers to understand their bills and undermines competition:

> "As the record in this proceeding demonstrates, line-item charges are being labeled in ways that could mislead consumers by detracting from their ability to fully understand the charges appearing on their monthly bills, thereby reducing their propensity to shop around for the best value. Consumers misled into believing that these charges are federally mandated, or that the amounts of the charges are established by law or government action, could decide that such shopping would be futile. In addition, lack of standard labeling could make comparison shopping infeasible. Unlike most products purchased by consumers, these line-item charges cannot be attributed to individual tangible articles of commerce. For example, when a consumer purchases socks from the local department store, the consumer knows what item the bill refers to, whether it describes the product as socks, men's wear, hosiery, etc. In contrast, a consumer receives no tangible product in conjunction with a line-item charge on his or her telecommunications bill." *I/M/O Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492 (May 11, 1999) at ¶ 62; Cf. Id. at ¶ 63 (carriers should be prevented from misleading consumers into believing they cannot "shop around" to find carriers that charge less for fees "resulting from federal regulatory action").

States differ in agency resources. This section allows the State to structure that enforcement – through their Attorney General, PUC, or other agency - utilizing either court or State administrative procedures.

There is also no logical reason to limit enforcement options. If the behavior is bad – leveraged enforcement, potential injunctive relief, higher fines and penalties can only add to the deterrence and further protect your constituents. This bill does not do so.

Instead, this bill specifies that "nothing in this title prohibits a State from imposing higher fines or more punitive civil or criminal remedies, including injunctive relief, for any violation of State laws that are not inconsistent with this title."

Finally, there is no reason to provide *another* defense to the wireless industry from lawsuits brought under laws of general applicability alleging fraud or deception. This bill does not do so.

The wireless industry has continuously alleged federal standards preempt lawsuits brought under State laws of general applicability. In almost all cases to date, no matter how obvious the fraud or deception, industry alleges such State initiated suits necessarily involves "rates" and is preempted by 47 U.S.C. § 332.[21] This provision, 107(b)(3) eliminates the possibility of carriers attempting the same thing with the provisions of this section.

SECTION 108 - EFFECT ON STATE LAW

As this committee is well aware, in our last few appearances, NARUC has consistently argued that any federal standards should be a floor not a ceiling. The now defunct "Communications Opportunity, Promotion, and Enhancement Act of 2006," as well as Senator Pryor's pending 2007 "Uniform Wireless Consumer Protection Act" sought to preempt all State rules and even State enforcement of wireless rules.

While this discussion draft clearly preserves State enforcement authority, it does create the framework for federal preemption of State rules and laws over wireless terms and conditions of service, and therefore violates our principle that federal rules should not act as a ceiling. Current NARUC policy instead prefers that States be allowed to continue holding their existing "other terms and conditions" authority reserved by 47 U.S.C. § 332.

The preemption envisioned in this draft is less sweeping than in the aforementioned bills. We therefore view it as a "cut-above" those approaches. Yet, to be faithful to existing NARUC policy, we must note our objection to State preemption in its various forms.[22]

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[21] See footnote 1, supra.

[22] At our recent February meetings in Washington, D.C., NARUC's Committee on Telecommunications revisited our position on wireless issues, and passed a resolution that would have revised NARUC's policy on the jurisdictional relationship between various levels of government over the terms and conditions of wireless service. The NARUC Board of Directors sent the resolution back to committee for further clarification. As an organization, we will keep the committee apprised of the progress NARUC makes in this regard.

CONCLUSION

Wireless service is something that consumers clearly want. It can improve the quality of consumers' lives, economic development and public safety. But it also is clear consumers must have effective avenues for timely resolution of complaints. State regulators are seeking a middle ground that relies on each level of government doing what it does best. It should be a partnership, not preemption. The "functional federalism" model endorsed by NARUC ensures multiple "cops on the beat" and is a win-win for consumers.

If you have any questions about this testimony, you can contact either one of use or call Brad Ramsay, NARUC's General Counsel at 202.898.2207 or Brian O'Hara, NARUC Legislative Director of Telecommunications at 202.898.2205.

The Honorable Marsha Smith
NARUC President

The Honorable Tony Clark
NARUC Chair
Committee on Telecommunications

The Honorable Ron Jones
NARUC Chair
Committee on Consumer Affairs

cc: Members of the House Subcommittee on Telecommunications and the Internet

Mr. MARKEY. The draft bill contains three sections. The first section seeks to create a policy framework for wireless services by providing for essential consumer protection rules at the national level, as well as by establishing an effective role for states in supplementing Federal Communications Commission enforcement efforts.

The first section addresses wireless early termination penalties, wireless plan and contract disclosures, so-called truth-in-billing rules, and service quality reporting. It tasks the FCC with promulgating these rules to reflect a nationwide wireless marketplace, consistent consumer protection rules, and the bill preempts the states except in limited circumstances from creating their own differing rules for such issues. The draft bill also specifically authorizes states to enforce the national rules, which I believe is indispensable for purposes of ensuring meaningful consumer protection.

The second bill, the second section of the bill clarifies that municipalities have the freedom to provide telecommunications services to their citizens. It reflects legislation introduced in this Congress by our colleagues Mr. Boucher and Mr. Upton and I commend them for their efforts. If a particular community is unhappy with the wireless broadband cable or phone services offered in its area, it should possess the clear freedom under the law to take action on its own to deploy and offer such services. The idea of municipal empowerment for broadband and other services is built upon provisions that are to make more with respect to municipal cable systems as part of the 1992 Cable Act.

I believe that we should establish a national policy for wireless consumer protection and state enforcement in this draft. It is simultaneously important to establish that municipalities can take action to offer wireless service on their own or any other communications service for that matter. The final section of the bill seeks to make the government more efficient in its spectrum use and requires the National Telecommunications and Information Administration in the Department of Commerce to conduct a full assessment of government use of the spectrum. As part of this assessment, the NTIA is instructed to not only identify frequencies that may be made available to reallocate from the government to the FCC for subsequent use, but also to identify frequencies and government bands that could be made available for sharing with nongovernmental users.

I look forward to working with the subcommittee ranking member, Mr. Stearns, and with Mr. Barton and of course Mr. Dingell, Mr. Boucher, Mr. Upton, and other colleagues who are interested in this legislation, and I also want to thank our expert panel for being here today. My time has expired. I am going to turn now and recognize the gentleman from Florida, the ranking member of the committee, Mr. Stearns.

[The Bill follows:]

[STAFF DISCUSSION DRAFT]

110TH CONGRESS
2D SESSION

H. R. _____

To require the Federal Communications Commission to promulgate new consumer protection regulations for wireless service subscribers, to restrict State and local regulation of public providers of advanced communications capability and service, to increase spectrum efficiency by Federal agencies, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. MARKEY introduced the following bill; which was referred to the Committee on _____

A BILL

To require the Federal Communications Commission to promulgate new consumer protection regulations for wireless service subscribers, to restrict State and local regulation of public providers of advanced communications capability and service, to increase spectrum efficiency by Federal agencies, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Wireless Consumer Protection and Community Broadband Empowerment Act of 2008".

SEC. 2. FINDINGS.

Congress finds the following:

(1) There are over 250 million subscribers to wireless service in the United States.

(2) Wireless service has become a replacement for traditional telephone service for millions of consumers in the United States.

(3) As wireless service is increasingly used and relied upon by residential and business consumers, such consumers will increasingly depend on Federal and State authorities to apply and enforce essential consumer protections applicable to such service in a manner commensurate with the role such authorities have played in ensuring consumer protection with traditional telephone service.

(4) Many consumers complain that some wireless service providers do not clearly or adequately disclose in plain language the products and services for which charges are imposed.

(5) Many consumers find it difficult to easily compare the costs and attributes of wireless service offered by different providers because of the lack of

consistency in how contracts for wireless service are presented.

(6) To make informed decisions in choosing between wireless service providers or plans, consumers need clear and concise wireless industry data that such consumers currently lack.

(7) Wireless service providers typically require customers to sign a contract for service for 2 years and charge early termination fees of $175 or more whenever a customer ends service before the expiration of such contract.

(8) These early termination fees are often levied at rates that do not reflect the cost of recovering the monetary amount of a bundled mobile device or any other expenditure for customer acquisition, and some carriers do not prorate the fee based upon when a customer terminates the service.

(9) In some instances, wireless service providers do not make readily available to consumers service maps with specific coverage data. As a result, many consumers learn that the wireless service for which they have subscribed does not meet their needs only after they have signed a 2-year contract and have begun using their mobile device.

(10) As wireless service providers increasingly offer broadband telecommunications and information services, consumer protection will be vital as consumer reliance on wireless service increases commensurately.

(11) Increasing the deployment of ubiquitous, affordable broadband service is a policy priority for the Nation.

(12) Many communities make available, or may seek to make available, advanced telecommunications services in their communities using wireless and other technologies as a way of ensuring ubiquitous, affordable high-speed broadband service in their areas.

(13) Such community networks, which may be used to offer an array of municipal services in addition to residential broadband service, are in the public interest, and no State should thwart the ability of a community to seek to provide such services to its citizens.

SEC. 3. DEFINITIONS.

(a) IN GENERAL.—In this Act:

(1) COMMISSION.—The term "Commission" means the Federal Communications Commission.

(2) COMMERCIAL MOBILE SERVICE.—The term "commercial mobile service" has the same meaning given such term in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)).

(3) WIRELESS CUSTOMER EQUIPMENT.—The term "wireless customer equipment" means equipment employed on the premises of a person or carried on a person (other than a carrier) to originate, route, or terminate information services or telecommunications.

(4) WIRELESS SERVICE PLAN.—The term "wireless service plan" means any legally binding agreement or contract between a commercial mobile service provider and a consumer related to the provision of commercial mobile service, including agreements related to the provision of wireless customer equipment for use with such service.

(5) CHARGES.—The term "charges" includes fees and taxes.

(b) OTHER TERMS.—Any terms not defined within this Act that are defined in section 3 of the Communications Act of 1934 (47 U.S.C. 153) have the meanings given in that section.

TITLE I—NATIONAL POLICY FOR WIRELESS SERVICE CONSUMER PROTECTION

SEC. 101. WIRELESS SERVICE PLAN DISCLOSURE.

(a) RULEMAKING REQUIRED REGARDING DISCLOSURE TO CONSUMERS OF TERMS AND CHARGES.—The Commission shall promulgate regulations requiring each commercial mobile service provider to describe the terms and charges associated with any wireless service plan offered by that provider in a clear, plain, and conspicuous manner, including providing to consumers—

(1) a description of the terms associated with any wireless service plan, including—

(A) the duration of any such plan;

(B) the duration of any trial period included in such plan;

(C) the number of minutes of service per month or other duration included in any such plan and the method by which such minutes will be calculated and assessed;

(D) the terms of subsidizing any wireless customer equipment; and

(E) the existence of any early termination fees, any service initiation fees, or any other non-recurring fees;

(2) a description of any charges associated with any such plan and the amount of such charges, including—

(A) monthly charges, per-minute charges, roaming charges, and charges for additional minutes not included in such plan;

(B) charges for long distance and international calling, charges for directory assistance, charges for receipt of incoming calls, and charges for additional services (such as text messaging services);

(C) charges for early termination, service initiation, or other non-recurring events;

(D) any Federal, State, or local taxes and any regulatory fees; and

(E) any other charges for which consumers may be assessed under any such plan; and

(3) any other information the Commission deems appropriate for ensuring that wireless consumers are fully and adequately informed about the terms and charges associated with wireless service plans.

(b) DISCLOSURE REQUIRED PRIOR TO WIRELESS SERVICE PLAN FORMATION.—Beginning 30 days after the Commission has promulgated the regulations required

under subsection (a), each commercial mobile service provider has the duty to provide to a consumer the information required under the regulations required by subsection (a) prior to such consumer entering into any new plan, modifying an existing plan, or renewing an existing plan for an additional period.

(c) FORMAT OF DISCLOSURE.—In carrying out subsection (a), the Commission shall examine the methods for providing the information required by subsection (a) to a consumer and shall promulgate rules regarding the formatting of printed or electronic disclosures of such information, as well as how consumers who receive plan information verbally may receive printed or electronic disclosures of such information.

SEC. 102. EARLY TERMINATION FEES.

(a) RULEMAKING REQUIREMENTS REGARDING EARLY TERMINATION FEES.—The Commission shall promulgate regulations requiring—

(1) each commercial mobile service provider to offer a wireless service plan for which there is no early termination fee;

(2) that if a commercial mobile service provider offers such plans with subsidized wireless customer equipment, such provider shall offer to consumers the opportunity to purchase subsidy-free wireless

customer equipment in return for the ability to secure service, without a long-term wireless service plan, at a price no higher than a comparable wireless service plan offered with subsidized wireless customer equipment; and

(3) for a wireless service plan that has an early termination fee, that the early termination fee shall be prorated over the duration of a consumer's wireless service plan in a manner that reasonably relates such fee to the recovery of the cost of any subsidy such consumer received when purchasing wireless customer equipment.

(b) MINIMUM EARLY TERMINATION FEE REDUCTION REQUIRED.—In carrying out subsection (a)(3), the Commission shall exercise its discretion, but the Commission shall require that the early termination fee for a wireless service plan with a duration of 2 years or more shall be reduced by at least half after one-half of such duration.

SEC. 103. WIRELESS SERVICE COVERAGE MAPS.

(a) RULEMAKING REQUIRED REGARDING SERVICE AREA MAPS.—The Commission shall promulgate regulations requiring each commercial mobile service provider to make available a map of the geographic area for which such provider is licensed to provide commercial mobile service depicting—

(1) the outdoor service coverage area of such provider, including the outdoor service coverage area of the consumer's local market; and

(2) any known outdoor service coverage gaps.

(b) SPECIFICITY OF REQUIRED MAPS.—

(1) IN GENERAL.—Each commercial mobile service provider shall generate at least one map for each area required under subsection (a) using predictive modeling and mapping techniques commonly used by radio frequency engineers in the commercial mobile service industry to depict approximate outdoor service coverage based on signal strength for the applicable commercial mobile service technology and signal strength confidence levels under normal operating conditions on such provider's network, factoring in topographic conditions and subject to variables that impact radio service generally, which shall be disclosed as material limitations in commercial mobile service coverage depiction and availability.

(2) UPDATING MAPS.—The map generated pursuant to paragraph (1) shall be updated at reasonably regular intervals.

(3) DETAILED USE.—The map generated pursuant to paragraph (1) shall be in sufficient detail to identify—

(A) generally geographic areas where commercial mobile service is not predicted to be regularly available; and

(B) whether or not a consumer is predicted to receive commercial mobile service in the general geographic area in which such consumer's primary residence is located, to the extent prediction of reception in such area is feasible using the formats specified in paragraph (1).

(c) DISCLOSURE TO CONSUMERS.—Each commercial mobile service provider shall provide to a consumer the map required under subsection (a)—

(1) upon the request of such consumer;

(2) when such consumer enters into a new wireless service plan; and

(3) at such other times as the Commission shall provide.

(d) ONLINE ACCESS.—Each commercial mobile service provider shall make available the map required under subsection (a) on such provider's Internet website (or comparable successor facility).

SEC. 104. BILLING POLICIES.

The Commission shall promulgate regulations—

(1) to prohibit a commercial mobile service provider from listing any charge on the billing state-

ment of a subscriber as a separately stated charge other than a charge—

(A) for telecommunications service or other service provided to a subscriber;

(B) for nonpayment, early termination of service, or other lawful penalty;

(C) for Federal, State, or local sales or excise taxes; or

(D) expressly authorized by a Federal, State, or local statute, rule, regulation, or order to appear on a subscriber's billing statement as a separately stated charge;

(2) to require each commercial mobile service provider to ensure that each bill sent to a subscriber for commercial mobile service is clearly organized, describes in plain language the products and services for which a charge was imposed, and conforms to such formatting standards as the Commission requires;

(3) to require that any charge specifically required by a Federal, State, or local statute, rule, regulation, or order to be collected from a subscriber be listed in a separate section of each bill sent to a subscriber and itemized separately in clear and plain language;

(4) to prohibit any charge which is not required to be collected from a subscriber under a Federal, State, or local statute, rule, regulation, or order from being included in the section of the bill described in paragraph (3);

(5) to require that, unless the subscriber otherwise requests, roaming or other off-network charges associated with any call for which a subscriber is charged a roaming or other off-network charge be itemized on each bill provided to such subscriber not later than 60 days after such call was placed and that such itemization clearly identify the date and location of such call; and

(6) to require that each commercial mobile service provider, upon the request of a subscriber, provide an itemized bill to such subscriber at no cost to such subscriber.

SEC. 105. SERVICE QUALITY MONITORING.

(a) IN GENERAL.—The Commission shall promulgate regulations to conduct examinations of the quality of commercial mobile service in the United States by requiring semiannual reports from commercial mobile service providers on the following:

(1) An assessment of the percentage of the licensed geographic market for which the commercial mobile service provider currently offers service.

(2) An assessment of the average outdoor signal strength within geographic areas to be determined by the Commission.

(3) An assessment of dropped calls within geographic areas to be determined by the Commission.

(4) Any known coverage gaps within geographic areas to be determined by the Commission.

(5) Any other matters the Commission considers appropriate.

(b) PUBLIC COMMENTS.—The Commission shall establish an Internet website through which members of the public can submit to the Commission their comments on the quality of service of any commercial mobile service provider.

(c) PUBLICATION.—The Commission shall make available to commercial mobile service providers and to the public on a semiannual basis a report summarizing and analyzing the information received under this section on the quality of commercial mobile service.

SEC. 106. WIRELESS SERVICE PLAN MODIFICATIONS AND TERMINATIONS.

(a) RULEMAKING REQUIRED.—The Commission shall promulgate regulations to require commercial mobile service providers to comply with each of the requirements in subsection (b), subsection (c), and subsection (d).

(b) VALIDITY OF EXTENSIONS.—

(1) IN GENERAL.—Beginning 30 days after the Commission has promulgated regulations under subsection (a), an extension of a wireless service plan shall not be valid unless—

(A) the commercial mobile service provider provides point-of-sale notice of such extension to the subscriber;

(B) the subscriber agrees to extend such plan by providing express consent to such extension; and

(C) the subscriber is given the right to cancel such extension for any reason within 30 days after the notice required by subparagraph (A) is provided.

(2) PENALTY-FREE TRIAL PERIOD.—If a subscriber cancels the extension of a wireless service plan within the 30-day period provided by paragraph (1)(C), the commercial mobile service provider may not impose a penalty or other charge for the can-

cellation on the subscriber. For the purposes of this paragraph, a charge for commercial mobile service provided to the subscriber during the extension period before cancellation shall not be considered to be a penalty or other charge for the cancellation.

(c) NOTICE OF PLAN CHANGES.—

(1) IN GENERAL.—Beginning 30 days after the Commission has promulgated regulations under subsection (a), a commercial mobile service provider shall provide directly to a subscriber written notice of any change in terms or charges of such subscriber's wireless service plan at least 30 days before such change is to take effect.

(2) RIGHT TO TERMINATE.—If such change in terms or charges of such subscriber's wireless service plan will result in higher rates or more restrictions on use of service or otherwise will result in a material, adverse change for a subscriber, such subscriber may, not later than 30 days after such change is to take effect, terminate the wireless service plan without penalty, including early termination fees, and receive a pro rata refund of the charges, if any, paid for wireless customer equipment used in conjunction with such plan.

(3) CONSUMER NOTICE.—The notice of change required under paragraph (1) shall inform a subscriber of—

(A) the right of that subscriber to terminate the service and to a pro rata refund for any wireless customer equipment; and

(B) the steps necessary to implement such a termination.

(d) CONSUMER RIGHT TO CANCEL SERVICE WITHIN 30 DAYS.—

(1) IN GENERAL.—Beginning 30 days after the Commission has promulgated regulations under subsection (a), a wireless service plan may be canceled upon the request of a subscriber for any reason during the 30-day period that begins on the date on which such plan was executed.

(2) NO PENALTY.—If a subscriber exercises the right to cancel such plan under paragraph (1), there shall be no penalty or other costs, including early termination fees, to such subscriber for such termination, except that such subscriber shall be responsible for paying the charges for the commercial mobile service used during the time period in which such plan was in effect and except as provided in paragraph (3).

(3) WIRELESS CUSTOMER EQUIPMENT.—If a subscriber exercises the right to cancel such plan under paragraph (1), a subscriber shall receive a pro rata refund of the charges, if any, paid for wireless customer equipment used in conjunction with such plan if such equipment is returned during such 30-day period.

SEC. 107. ENFORCEMENT.

(a) ENFORCEMENT BY THE COMMISSION.—

(1) IN GENERAL.—Nothwithstanding sections 2(b) and 221(b) of the Communications Act of 1934 (47 U.S.C. 152(b), 47 U.S.C. 221(b)), the Commission shall have the power and authority to enforce the provisions of this title (and the rules, regulations, and orders issued under this title) as if such provisions were provisions of the Communications Act of 1934 (or of rules, regulations, or orders issued under such Act).

(2) PENALTIES.—Penalties authorized by title V of the Communications Act of 1934 may be imposed under this subsection for a violation of a provision of this title or any rule, regulation, or order issued under this title.

(b) ENFORCEMENT BY THE STATES.—

(1) AUTHORITY.—The attorney general of a State, the public utility commission, or any other State agency authorized by State law may—

(A) bring a civil action on behalf of the residents of the State in a district court of the United States of appropriate jurisdiction to enforce the provisions of this title; and

(B) utilize administrative procedures authorized by the State to enforce the provisions of this title.

(2) PENALTIES.—Penalties authorized by title V of the Communications Act of 1934 for a violation of a provision of that Act, or a rule, regulation, or order issued under that Act, may be imposed in a civil action under the subsection for a violation of a provision of this title, or a rule, regulation, or order issued under this title. However, nothing in this title prohibits a State from imposing higher fines or more punitive civil or criminal remedies, including injunctive relief, for any violation of State laws that are not inconsistent with this title.

(3) SAVINGS.—Nothing in this section shall be construed to preempt or otherwise affect laws of general applicability in a State.

SEC. 108. EFFECT ON STATE LAW.

(a) IN GENERAL.—This title preempts the laws of any State to the extent that such laws are inconsistent with this title, or the rules, regulations, or orders issued under this title, except that this title shall not preempt any State laws or actions that provide additional enforcement protection to consumers of commercial mobile service if any such laws or enforcement actions are consistent with this title and the rules, regulations, or orders issued until this title.

(b) RIGHT TO PETITION.—A commercial mobile service provider may submit a petition to the Commission to challenge State consumer protection measures as inconsistent with this title or the rules, regulations, or orders issued under this title. The Commission shall act on any such petition within 90 days and shall determine whether such measure is inconsistent with this title or with rules, regulations, or orders issued by the Commission pursuant to this title.

(c) RETENTION OF STATE ENFORCEMENT AUTHORITY.—Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of offering commercial mobile service to residents of that State in violation of this title, or rules, regulations, or orders issued under this title, the State may

bring a civil action on behalf of its residents to enjoin such offering of commercial mobile service, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions, if the State has served prior written notice of any such civil action upon the Commission and provided the Commission with a copy of its complaint. The Commission shall have the right—

(1) to intervene in the action;

(2) upon so intervening, to be heard on all matters arising from such action; and

(3) to file petitions for appeal.

SEC. 109. DEADLINE FOR PROMULGATION OF REGULATIONS.

The Commission shall promulgate regulations required by this title not later than 120 days after the date of enactment of this Act and thereafter may amend such regulations from time to time.

TITLE II—COMMUNITY BROADBAND EMPOWERMENT

SEC. 201. LOCAL GOVERNMENT PROVISION OF ADVANCED COMMUNICATIONS CAPABILITY AND SERVICES.

No State or local government statute, regulation, or other legal requirement may prohibit, or have the effect of prohibiting, any public provider from providing ad-

vanced communications capability or service to any person or to any public or private entity.

SEC. 202. SAFEGUARDS.

(a) COMPETITION NEUTRALITY.—A public provider—

(1) shall not grant any regulatory preference to itself or to any provider of advanced communications capability or service that it owns or with which it is affiliated; and

(2) shall apply its ordinances, rules, and policies, including those relating to the use of public rights-of-way, permitting, performance bonding, procurement, and reporting, without discrimination in favor of any such provider as compared to other providers of such capability or service.

(b) APPLICATION OF GENERAL LAWS.—Except as provided in section 201 and subsection (a) of this section, nothing in this title affects any obligation or benefit that a public provider has under any other Federal or State law or regulation.

SEC. 203. COMMUNITY INPUT.

(a) NOTICE AND COMMUNITY INPUT.—Before a public provider may provide advanced communications capability or service to the public, either directly or through a public-private partnership, such public provider shall—

(1) publish a notice of its intention to do so that—

(A) generally describes the advanced communications capability or service to be provided and the proposed coverage area for such capability or service; and

(B) identifies any special advanced communications capability or service to be provided in low-income areas or other demographically or geographically defined areas; and

(2) provide local citizens and private-sector entities with an opportunity to be heard on the costs and benefits of the project and potential alternatives to it.

(b) APPLICATION TO EXISTING PROJECTS AND PENDING PROPOSALS.—Subsection (a) does not apply to—

(1) any contract or other arrangement under which a public provider is providing advanced communications capability or service to the public as of the date of enactment of this Act; and

(2) any proposal by a public provider to provide advanced communications capability or service to the public that, as of such date of enactment—

(A) is in the request-for-proposals process;

(B) is in the process of being built; or

(C) has been approved by referendum.

SEC. 204. EXEMPTIONS.

The requirements of sections 202 and 203 do not apply—

(1) to a public provider's provision of advanced communications capability or service to itself or to another public entity; or

(2) during an emergency declared by—

(A) the President;

(B) the Governor of the State in which the public provider is located; or

(C) any other elected local official authorized by law to declare a state of emergency in the jurisdiction in which the public provider is located.

SEC. 205. DEFINITIONS.

In this title, the following definitions apply:

(1) ADVANCED COMMUNICATIONS CAPABILITY OR SERVICE.—The term "advanced communications capability or service" means a capability or service that enables a user to originate or receive high-quality voice, data, graphics, video, or other communications using any broadband technology.

(2) PUBLIC PROVIDER.—The term "public provider" means a State or political subdivision thereof, any agency, authority, or instrumentality of a State or political subdivision thereof, or any entity that is owned, controlled, or otherwise affiliated with a State, political subdivision thereof, or its agency, authority, or instrumentality.

TITLE III—SPECTRUM EFFICIENCY AND AVAILABILITY ASSESSMENT

SEC. 301. EFFICIENCY IMPLEMENTATION PLAN AND SPECTRUM AVAILABILITY ASSESSMENT.

Section 104 of the National Telecommunications and Information Administration Organization Act (47 U.S.C. 903) is amended by adding at the end the following new subsections:

"(f) SPECTRUM EFFICIENCY PLAN.—Within 180 days after the date of enactment of the Wireless Consumer Protection and Community Broadband Empowerment Act of 2008, the Secretary shall adopt and commence implementation of a plan for Federal agencies with existing mobile radio systems to use spectrum technologies that are more spectrum-efficient and cost-effective. Such plan shall include a time-table for implementation. Such plan shall include requirements that Federal agencies with existing

mobile radio systems use smart radio receiver technology to the extent technologically feasible and economically reasonable.

"(g) REPORT.—Within 270 days after the date of enactment of the Wireless Consumer Protection and Community Broadband Empowerment Act of 2008, the Secretary shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report containing the following—

"(1) a summary of the plan adopted under subsection (f);

"(2) a list of frequencies that, due to the greater efficiency obtained under the plan adopted under subsection (f) or through other initiatives, can be made available for re-allocation to the Commission;

"(3) a list of frequencies that, due to the greater efficiency obtained under the plan adopted under subsection (f) or through other initiatives, can be made available for use by the public on a shared or secondary basis for commercial or non-commercial use;

"(4) a time-table for implementing any re-allocation possible under paragraph (2) or sharing under paragraph (3); and

"(5) a detailed itemization of frequencies for which re-allocation or sharing is not possible and the reasons why such action can not occur.

"(h) DEFINITIONS.—For purposes of this section, the following definitions apply:

"(1) SMART RADIO RECEIVER.—The term "smart radio receiver" means a device that receives wireless transmissions in a manner that is highly efficient and is typified by software-defined radio devices and devices that, in general, can increase spectrum usage by dynamically sensing transmissions and adapting in frequency, time, and space to do so.

"(2) SHARED OR SECONDARY BASIS.—The term "shared or secondary basis" means that Government agencies are the primary licensees of particular spectrum, but that non-governmental users may use such frequencies on a shared, or co-equal basis, from the standpoint of frequency interference mitigation, or on a secondary basis where non-governmental users must limit interference to governmental use.".

OPENING STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. STEARNS. Good morning, and thank you, Mr. Chairman, for recognizing with your draft legislation the need to ensure a national regulatory framework for wireless. The industry's tremendous success is a direct result of the decision of Congress in 1993 to preempt state and local regulation of wireless rates and entry. Towards that end, Mr. Chairman, I ask unanimous consent to submit for the record the following letter from the U.S. Telecom Association and other telecom associations who wrote to me expressing their specific concerns with Title II of the draft legislation.

Mr. MARKEY. Without objection, it will be included in the record.

[The information follows:]

OPASTCO

February 26, 2008

The Honorable Edward J. Markey
Chairman
Subcommittee on Telecommunications and the Internet
House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Markey:

On behalf of the telecom providers represented by ITTA, NTCA, OPASTCO, USTelecom, and WTA, whose member companies deliver broadband service to all parts of our nation, including rural and insular areas, we appreciate the opportunity to comment on the "Wireless Consumer Protection and Community Broadband Empowerment Act of 2008." We write to express our specific concerns with the inclusion of Title II – Community Broadband Empowerment.

The climate for government-owned networks has changed markedly since the committee first began examining the issue. From San Francisco to Houston to Chicago, ambitious municipal broadband plans are being scaled back drastically or abandoned outright, due to the rising costs, complex technological hurdles, and underwhelming consumer demand. Just last week, one industry analyst warned in Philadelphia, "While deployments with lofty goals have made great political announcements, they have been poorly planned....there has also been some talk of the city taking ownership of the network and hiring a firm to operate it, **but it seems like a dangerous business plan to spend millions of tax dollars on such a risky venture**." With far less fanfare, our member companies continue to make rural broadband investments that frequently would be impossible without a solid core of customers in communities with some measure of population density.

Since we last communicated with the committee in October, broadband deployment in the United States has continued to accelerate from just over 4 million broadband lines in 2000 to just under 16 million broadband lines in 2002 to approximately 32 million lines in 2004 to 82.5 million lines in 2006. The market-based approach on wireless services also has permitted wireless broadband services to explode. In June of 2005, there were almost 380,000 wireless broadband subscribers; in December of 2006, there were more than 21.9 million.

While there are still some areas in which broadband is not available, we have worked closely with House and Senate Agriculture Committees through the Farm bill process to improve the RUS broadband program, target it to unserved areas, as well as to develop public-private partnerships along the lines of ConnectKentucky to map broadband deployment and address important factors affecting broadband demand.

We still believe federal municipal broadband legislation would chill private investment in existing and future broadband networks. This ultimately leads to less, not more, broadband deployment as the investment risk for private entities is unnecessarily increased and private capital is displaced with public funds, needlessly burdening taxpayers. Additionally, federal municipal broadband legislation encourages cherry picking the easier to serve areas within town limits, diminishing the feasibility of broadband service in the more costly to serve outlying areas.

We would respectfully remind the committee that fourteen states have already come to the conclusion that regulating municipal entry enhances broadband deployment. At a minimum, we believe the draft legislation should be modified to limit its effect to areas without existing broadband service and further legislative language to prevent municipal broadband networks from being cross subsidized and thus able to offer cut-rate prices that cannot be matched by private firms.

We hope the committee will carefully examine the unintended consequences of federal municipal broadband legislation and look forward to working with you to improve broadband deployment to all Americans.

Sincerely,

Walter B. McCormick, Jr.
President and CEO
USTelecom

John Rose
President
OPASTCO

Curt Stamp
President, Independent Telephone &
Telecommunications Alliance

Kelly Worthington
Executive Vice President
Western Telecommunications Alliance

Michael E. Brunner
Chief Executive Officer
National Telecommunications Cooperative Association

cc: Members of the Subcommittee on Telecommunications and the Internet
House Committee on Energy and Commerce

Mr. STEARNS. Thank you, Mr. Chairman. In 1993 the number of wireless subscribers was 11 million. Now it is 250 million. In 1993 the average local monthly bill was $96.58. Adjusted for inflation now it is below $50. In 1993 the cost per minute was 44 cents. Now it is 4 cents. And the average minutes of use has grown from 121 to 746, the most of any country. Today 98 percent of Americans live in counties with 3 or more wireless providers. Ninety-four percent live in areas with 4 or more, and 59 percent live in areas with 5 or more. There are more than 150 wireless providers in the United States, ranging from nationwide to regional and local providers.

Americans have a choice of over 600 handsets. They also have a growing array of options when it comes to plans, including single line, family, and prepaid hybrid plans. States can still regulate terms and conditions. However, despite all this competition a number had begun imposing a requirement governing what type of plan carriers can offer, the fees that they can charge, what type of service maps must be available, and the size of the font that must appear on each bill. Wireless carriers are quickly facing a patchwork of disparate regulations that will raise costs for consumers, hinder investments, and ultimately slow innovation.

This state regulation is not only unnecessary, but also harmful given the level of competition that exists today in the market. While I think that the chairman's draft legislation has the right idea by creating nationwide consumer protection standards, and clearing the way for the wireless industry to continue on its current, vibrant trajectory, I am concerned that it replaces cumbersome state regulation with overly prescriptive regulation on the Federal level. The current draft also does not have workable preemption and enforcement provisions that would end once and for all a 50-state patchwork of different regulations.

Our best approach would be to create moderate Federal guidelines that ensure carriers can cater their service to differing consumer needs while ensuring that consumers are well informed of all their options so they can find the best package that suits them and that they like. I look forward to working together with the chairman to chart such a course. I am also pleased that the chairman included in the draft a requirement that the NTIA develop a plan to make government users of spectrum more efficient and to identify the availability of spectrum that can be shared or reallocated for commercial use.

This is an important first step to secure the additional spectrum that will be needed to fuel the next generation of advanced services. I am concerned with the inclusion of the "Community Broadband Empowerment Act" which is in the draft. As local governments have learned the hard way through problems in Philadelphia; San Francisco; Chicago; Houston; Tempe, Arizona; Toledo; Marietta, Georgia; and Portland, Oregon, municipalities are poorly equipped to run ongoing viable broadband businesses. The ability of them to fund their program with tax revenues also makes them less vigilant in managing the costs, and as unfair, frankly, the private businesses are trying to do this and trying to compete with them.

I would hope that we would at least limit these networks to areas where there are no current providers of service and where

private industry is given the first right of refusal to serve that area to bring in competition, the free market, and ultimately choice to the consumer. With that, Mr. Chairman, I yield back.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Pittsburgh, Mr. Doyle.

OPENING STATEMENT OF HON. MIKE DOYLE, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. DOYLE. Thank you, Mr. Chairman. Mr. Chairman, I tried to call you last night after the debate, but I couldn't get a hold of you, but I did get to speak to this really nice lady who told me if I wanted to page this person press 2 or that I could leave a message after the tone and after I finished that, I could hang up or I could press 5 for more options. Eddie, I got to tell you in the 50 years I have been using telephones, I really appreciate getting instructions on how to use a voice mail. And besides, I have got so many minutes on my phone, I don't mind using 3 of them to leave you a message, but I digress.

I just want to say I really appreciate everyone being here today. Let me say I support the goal of today's draft bill. The reality is wireless is a national product. I get to carry one device. I get one phone number almost anywhere I go in the world. I grew up in a world where that stuff was right out of the Jetsons or Star Trek. To have it be real and to have it be an integral part of our life, I think is incredible. And those facts lead me to support the carriers' call for state preemption, but if we are going to replace state control, then I believe we have to create a national framework for consumer protection.

I am sure some will wonder why we just don't preempt states rights and completely let the market and the carriers and the consumers do their things. I believe markets depend on information, accurate information, like the bill calls for carriers to provide consumers. I want to make sure consumers have the information they need to make an informed decision, that they know their options and that they know who to go to if they need help. One consumer posted a video where he called a carrier and spoke to 56 different representatives with questions about a data plan. From those 56 people, he received 22 incorrect answers. Only one sales agent got the answer right, and 93 percent of them quoted the guy inaccurate information.

I would hate to sign up for a 2-year contract thinking I was liable for 2 cents a megabyte, the quoted price, when I was really liable for $2.00 a megabyte while surfing the web on my phone. Some carriers have rolled out contracts with early termination fees that decrease over time getting ahead of the mandates in this draft bill. I applaud that smart pro-consumer move. Even better, other carriers have announced intentions to follow suit, but several of those who announced months ago that they were going to roll out prorated early termination fees still haven't. Interestingly enough, one of those carrier's sales agents provided mystery shoppers with inaccurate information ⅔ of the time during a dozen inquiries according to Corey Boles at Dow Jones. Now even if those are fixed, and the bill goes a long way to doing that, there are always going to

be consumers who complain that their service doesn't work well in a new home or a new neighborhood, and they can't switch because they are locked in for 2 years.

I don't think that the carriers are actively trying to take advantage of their consumers, but there does need to be a way to effectively handle disputes and complaints. I say all this today because if they are going to preempt bills on these issues that are pending in states across the country, including bills that are pending in the Pennsylvania State Senate, then I believe we are going to have to come up with an alternative. So, Mr. Chairman, thank you and thank everyone for coming to the table. I hope we can hammer out a deal soon. I think that what you put down is a great first step towards creating a true win-win for consumers and for carriers, and I yield back.

Mr. MARKEY. I thank the gentleman. The chair recognizes the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. I think I will reserve my time for questions.

Mr. MARKEY. The chair recognizes the gentlelady from California, Ms. Harman.

OPENING STATEMENT OF HON. JANE HARMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. HARMAN. Thank you, Mr. Chairman, and good morning to our witnesses. When he arrived this morning, Mr. Doyle preempted my seat, but now that I have heard his remarks, I support his preemption. My point is content matters. The content of the concept of preemption, as he said, is fine, but as a Californian whose state leads the nation at all times in regulation of light bulbs and the environment and consumer protection, preemption must offer something better than the regulations of my state. Last summer only hours after attending a telecom subcommittee hearing on the future of the wireless market, my brand new Blackberry abruptly stopped transmitting.

After 2 weeks of tech support phone calls, two non-functional Blackberry replacements, and a lot of frustration, my wireless carrier finally resolved the problem. Many wireless consumers are not so lucky. They do not have the support of the House telecom staff, and more importantly, they do not have my talent for striking fear into the hearts of customer service reps everywhere. Just ask my children. I am encouraged that many wireless carriers are already implementing some of the consumer protection measures in this draft bill, but millions of phone toting Americans still anguish at the prospect of resolving disputes with carriers and even understanding the terms and conditions of their wireless service.

A national regulatory framework can work in consumers' favor provided it balances state preemption with strong consumer rights and protections. Measures that States like California now have on the books, such as the 30-day buyer's remorse period, should be a floor and not a ceiling for national regulation. States also are now playing a critical role in enforcement, and in 2006 California added 20 full-time staff to its Public Utility Commission's complaint bureau and established a 9-person telecom fraud unit. Effective enforcement must not be a casualty of national regulation. I look for-

ward to working with Chairman Markey and Chairman Dingell to achieve bipartisan consensus on this bill. Some tough issues remain, as has been said, but it behooves us in the great tradition of this committee to work together to resolve them. I yield back.

Mr. MARKEY. The gentlelady's time has expired. The chair recognizes the gentleman from Texas, Mr. Gonzalez.

Mr. GONZALEZ. Waive opening.

Mr. MARKEY. The chair recognizes the gentlelady from California, Ms. Solis.

OPENING STATEMENT OF HON. HILDA SOLIS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. SOLIS. Thank you, Mr. Chairman, and good morning. I would like to thank you and Ranking Member Upton for having this hearing today. And I would also think that this is a very important step toward consumer protection for wireless customers and in districts like mine where access is a very important word and something that sometimes we may forget here in the Capitol, but there are a lot of folks out there that rely very heavily especially in a community like mine where wireless service is very important to the Latino community. In fact, according to a recent poll report by the PEW Hispanic Center, a survey that they issued, 59 percent of all Latino adults in the U.S. considered the cell phone a necessity. They tend to have more cell phones than they do regular land lines in their homes.

So it is rather a necessity than a luxury for many of those people that we represent. And while there is significant competition in the wireless marketplace, we must continue to monitor the need for increased consumer protection. Consumers are still sometimes confused about the billing practices, and I can say that in all honesty because I know we have dealt with that in my own household, reading the fine print and understanding what these contracts mean and in many cases having to pay additional costs for trying to change your server.

I am interested in the title of the bill that we will be discussing that would allow municipal broadband networks around the country to be also involved. There is room for improvement there, and in California a prohibition on municipal broadband services was included in our statewide video franchising law that was enacted in 2006. I am interested to learn more about the municipal broadband options the draft bill would provide, since municipal broadband could provide a backstop to ensure that all our consumers have access. And I am also encouraged by the recent news that many of the major wireless carriers are prorating their early termination fees, which I think is a good step in the right direction, but we need to see more there. So I am looking forward to hearing from our witnesses and look forward to hearing from all of you. Thank you. I yield back.

Mr. MARKEY. The gentlelady's time has expired. The chair recognizes the gentleman from Michigan.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. I thank the Chairman. I would have been on time as well, but I saw you on a different channel in my office, and I saw Mr. Stearns as well. I appreciate you having this hearing today on the Wireless Consumer Protection and Community Broadband Empowerment Act of '08. It should be noted that you have included in the draft legislation that I helped co-sponsor with Mr. Boucher on municipal broadband services. The U.S. wireless industry is the embodiment of competition. We have four national competitors, several large regional providers and nearly 150 terrestrial mobile providers in all.

More than 95 percent of the U.S. population lives in areas with at least 3 mobile providers and more than half of the population lives in an area with at least 5 competing providers. These choices provide tremendous opportunities for consumers, and according to the FCC, U.S. consumers continue to reap significant benefits, including low prices, new technologies, improved service quality, and choice among providers from competition in the commercial mobile radio services marketplace. The FCC has recognized that service quality in particular has significantly improved. The average monthly bill has dropped dramatically from 1997, when it was almost $100; the average bill for AT&T now is less than $40 a month.

To me, these declining rates, growing numbers of customers in a competitive marketplace resulting in new products and new services, suggest that there is no market failure requiring any new significant regulatory requirements. In this context of competition and innovation, including broadband services at low prices and with increasing better service quality, this subcommittee needs to ask whether the draft legislation before us is appropriate. I think there is plenty of room for improvement. I would certainly support preempting state regulation of wireless services. These services are increasingly interstate in nature, and consumers would not benefit from a patchwork of state regulations.

However, the draft does not preempt state regulation, and any such regulation that is consistent with Federal regulations promulgated pursuant to this bill would be permitted. In addition, the bill goes too far, I think, in terms of requiring the FCC to micromanage the relationships between wireless carriers and their consumers. Competition has spurred wireless carriers to address the issues that would be the subject of FCC regulation under the bill. CTIA's consumer code covers most, if not all, of these issues, and the major carriers and many smaller ones are signatories of that very same code. We should let competition continue to increase innovation, lower prices, and enhance service quality.

Finally, I would simply like to take particular note of the draft bill's second congressional finding that wireless service has become a replacement for traditional telephone service for millions of consumers in the U.S. This finding captures a significant change of circumstances that demonstrates how profoundly things have changed. With 250 million subscribers and a congressional finding that wireless has become a replacement for this service, I would

say that the transition has long been complete. Let us tread very carefully as we look to the future. Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Washington State, Mr. Inslee.

OPENING STATEMENT OF HON. JAY INSLEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mr. INSLEE. Thank you. I look forward to working on this. Mr. Boucher and I and Ms. Blackburn a couple years ago were working—took a stab at this and couldn't get the thing through due to germaneness, so I am glad we are back here to work on it. I think that a national standard is probably—you can't think of a more appropriate place than a totally interstate commerce industry like this one, and I hope that we can come up with the national standard with strong consumer rules and strong enforcement. And I think this legislative package is a good place to start and look forward to working with you. Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from California, Mr. Radanovich.

OPENING STATEMENT OF HON. GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. RADANOVICH. Thank you, Mr. Chairman. I appreciate this hearing, and I do have a statement to read. If it takes too long, I will submit the rest for the record. But I did want to state the appreciation for the hearing but also mention that competition in the marketplace is what we should be constantly striving for to achieve, be it in telecommunications or in any other industry, because it is always far superior at meeting consumer needs than government regulation. Choice created through competition drives innovation. It lowers prices, increases quality of services, and makes things better for consumers. Competition helps consumers gain control of the marketplace and tailor products and services to their individual wants and needs.

Nowhere are these benefits of competition more apparent than in the area of wireless communications. Cell phones and wireless e-mails and text have become a nearly ubiquitous component of our everyday lives. The wireless communication can do much more than that. As the representative for a fairly rural district, we have our share of communications difficulties. The digital divide is something that many of my areas have struggled to deal with while access to quick, reliable Internet service is almost a necessity to be successful in today's world. I believe that wireless broadband can be a real solution for areas like much of my district that are less populated to provide services if we continue to allow the industry to develop free of unnecessary and burdensome regulation.

I want to see providers investing in delivery of broadband to rural areas, not dedicating resources to complying with potentially 50 different sets of rules. When Congress preempted the states on rates and entry it was a good start. We could all see how the industry has flourished with that national standard, but now it is time to finish the job and establish one national standard framework for regulation that recognizes the undeniably interstate nature of the

industry. The current threat of state-by-state regulation is harmful to consumers. It prevents them from fully benefiting from the cost savings that should be realized from the efficiencies of national frameworks and marketing, customer care operations, and other back office support for one of those services.

I believe we need one set of uniform rules that apply equally to all American consumers in at least the wireless industry from the disparate regulatory burdens, then we will really see how much our constituents can benefit from a competitive industry and a free marketplace. I commend the chairman for putting out this draft bill. It is a true acknowledgement of the need for a national framework. However, I am concerned that the national framework created by this draft does not go far enough to achieve that goal. I believe we need a simple standard that clearly establishes Federal authority in the area of wireless consumer protection, terms and conditions, and in order to be successful this framework must serve both as a floor and a ceiling, because to only create a baseline but allow the imposition of 50 different levels of onerous regulation even if they are technically consistent with the statutes will defeat the very purpose behind establishing a national standard.

I think we have a good start before us, but there is still work to be done. I look forward to working with my colleagues on both sides of the aisle to achieve the result that is best for the wireless consumers. Thank you, sir, for the hearing.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Michigan, Mr. Stupak.

Mr. STUPAK. Mr. Chairman, I will waive and ask for extra time at questions.

Mr. MARKEY. The chair recognizes the gentleman from Virginia, Mr. Boucher, whose legislation along with Mr. Upton's is included in our draft legislation, and I mentioned that in my opening statement. I now recognize the gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I would like to reserve my time.

Mr. MARKEY. The gentleman's time is reserved. The chair recognizes the gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. I will ask that my full statement be placed in the record, but I want to thank you for the hearing today, and I appreciate your effort on this bill, and the legislation is a work in progress. I am looking forward to seeing how we can even improve it even better, but I am glad you started, you laid down this mark for us, and with that I will yield back my time.

Mr. MARKEY. The gentleman's time will be reserved, and we now turn to our opening panel, and that is a very, very distinguished panel indeed, and we thank each of you for being here. The first witness is Mr. Joey Durel, Jr. He is the President of the Lafayette, Louisiana City Parish, and he is testifying on behalf of the American Public Power Association. Under his leadership, Lafayette has successfully deployed municipal broadband facilities. We welcome you sir. Whenever you are ready, you have 5 minutes to make an opening statement.

STATEMENT OF JOEY DUREL, JR., CITY-PARISH PRESIDENT, CITY OF LAFAYETTE, LOUISIANA

Mr. DUREL. Thank you. Good morning, Chairman Markey, Ranking Member Stearns, and members of the Telecommunications Subcommittee. My name is Joey Durel, and I am the City-Parish President of Lafayette, Louisiana. I am testifying today on behalf of the American Public Power Association, of which Lafayette is a member, and I am also the current Vice-Chairman of APPA's Policy Council. The American Public Power Association is a nationwide service organization representing the interests of the nation's more than 2,000 state and community-owned electric utilities that collectively serve over 44 million Americans.

And I am going to tell you a little bit about Lafayette's story and what we did. I ran for office for the first time in 2003 and was elected at the end of 2003, and took office in 2004, January. And when people ask me why, as I am sure many of you heard at some time in your political career, why in the world would you do this, why would you do this to your family, the first answer that came out of my mouth was I want my kids to stay home. We have migration in Louisiana of our greatest export, which of course is our kids. We educate them well for many of you, send them to your states. And one of the things that I said was we have to get out of the box.

I hear politicians talk, that was one of my frustrations, I have heard politicians talk in Louisiana for a long time about getting things done, and they never did anything to correct this issue that I saw. And what I learned as we went through our little journey is that the reason people stay in the box is because getting out of the box can make many people very uncomfortable. One of the things that we were able to do in our—and, by the way, let me stress real quick. I know I heard a lot about wireless. What we are doing is fiber optics. We are deploying fiber optics throughout our community to our 120, 125 residents and businesses. And one of the first things I was able to do, because I don't see this as a partisan issue, is we were able to get the Democratic party in Lafayette and the Republican party in Lafayette to stand hand in hand for something that they saw as being important to the citizens, and so that was—and, by the way, my going on there—I was the Republican mayor of Lafayette, so naturally the Democratic party would have been against it normally, and the Republicans would have been against it because of various mantra that we hear all the time.

And Lafayette is also the ninth most conservative city in America according to a study at Berkeley. All the past presidents of our Chamber of Commerce——

Mr. MARKEY. For Berkeley to pick you out, that is quite an honor.

Mr. DUREL. That is why I stressed that. All the past presidents of the Lafayette Chamber of Commerce of which I was a member, a past president, endorsed the project. Every single business organization in Lafayette endorsed the project, and ultimately we took it to a vote of the people, and we got a 62 to 38 percent vote of that very conservative community in favor of it. One of the things that we did a little bit to sell the project was that we were going

to provide much better service for 20 percent or so cheaper than what they could get. But that wasn't the motive for me. It was economic development. It was getting out of the box to try to keep our young people home.

We are going to have something, and I think this is a strong statement, but we are going to have—you are not going to have in Washington 20, 25 years from now, in fact, probably 90 percent of America won't have 20 or 25 years, and I think that is a sin for America. And the reason—and when I say that what I am stressing is not just the fiber optics, but we are going to have something initially that I hope some others will have in the not too distant future, but we hear a lot about megabits per second, and one of the things you hear is 1 megabits per second. When we start ours up at the end of this year, and we are in the wholesale business right now so we have been doing this for a few years, but we are getting the retail television, telephone and Internet business, we are going to be able to provide our citizens peer-to-peer, customer-to-customer, 100 megabits per second for free.

We are currently sending a gigabyte, 1,000 megabits per second, to our school board, and 100 megabits to every school in Lafayette Parish. Since we started talking about it, we have a company from Canada called Newcom that is coming to Lafayette and providing 100 jobs. It is a technology kind of company, and I asked the owner, I said we don't even have it yet, why are you here? He said just the fact that you all are making technology such a priority is what drove us here from among 200 cities that we were competing with around the world. The digital divide, I heard somebody mention the digital divide. We think we will be the first community in America to solve that issue. People that are on our system will be able to surf the Internet from their televisions with a wireless keypad and a wireless mouse.

I am going to say this anyway even though I debated, and this is very tongue in cheek, but I hope 49 states outlaw doing what we are doing, and I say that in a way to make a point, because what I would tell those states is please send your technology companies to Lafayette, Louisiana, where we will welcome them with open arms and a gumbo. But the point is I think we have an opportunity in America just like we did in the 1890s with electricity. We were told in 1896 or so that the private companies couldn't justify bringing the electricity to our little town, and so our message to our citizens over the last 3 or 4 years was a really good message and a really easy message, because we told them if we don't do it, we are not going to get it.

And I want you to know I begged, I begged the private companies to do it so we wouldn't have to. I begged them in my office. I begged them publicly. I begged them to do it, because why would we want to do something like this? It turns out what we have is an opportunity to do something where a town in south Louisiana is leading America in something that we hope the rest of America will follow one day. So hopefully what you will do with this bill as it relates to what we are doing is remove any impediments from municipalities, even what I have heard talked about today is competition, because that is what has made America great. Thank you very much.

[The prepared statement of Mr. Durel follows:]

STATEMENT OF JOEY DUREL, JR.

Good morning Chairman Markey, Ranking Member Stearns and members of the Telecommunications Subcommittee. My name is Joey Durel and I am the City-Parish President of Lafayette, Louisiana. I am testifying today on behalf of the American Public Power Association, of which Lafayette is a member. I am also the current Vice-Chairman of APPA's Policy Makers Council.

The American Public Power Association (APPA) is the national service organization representing the interests of the nation's more than 2,000 state and community-owned electric utilities that collectively serve over 44 million Americans. These utilities include state public power agencies, municipal electric utilities, and special utility districts that provide electricity and other services to some of the nation's largest cities such as Los Angeles, Seattle, San Antonio, and Jacksonville, as well as some of its smallest towns. The vast majority of these public power systems serve small and medium-sized communities, in 49 states, all but Hawaii. In fact, 75 percent of publicly-owned electric utilities are located in communities with populations of 10,000 people or less.

Many of these public power systems were established largely due to the failure of private utilities to provide electricity to smaller communities, which were then viewed as unprofitable. In these cases, communities formed public power systems to do for themselves what they viewed to be of vital importance to their quality of life and economic prosperity.

This same development is occurring today in the area of advanced communications services just as it did in electricity over 100 years ago. Public power systems in some areas are meeting the new demands of their communities by providing broadband services where such services are unavailable, inadequate, or too expensive. These services, provided with high quality and at affordable prices, are crucial to the economic success of communities across the nation.

Thus, Mr. Chairman, my testimony today will focus exclusively on Title II of the discussion draft regarding community broadband empowerment. APPA has not adopted policy positions on the subjects addressed in Titles I and III of the draft.

Specifically, I am here today, to explain how Lafayette, Louisiana undertook its own efforts to provide reliable and affordable broadband services to its citizens. You've heard similar testimony before. Last October, Wes Rosenbalm of Bristol, Virginia, another APPA member, testified at your hearing on the Future of Telecommunications Competition regarding Bristol's successful deployment of a system that is benefiting their community. Bristol is a good example of what a successfully deployed system can bring to its region. Lafayette is another example of the hard fought road many communities have to take to be allowed to provide that service.

Lafayette, Louisiana's story began in 1999 when our utility system, Lafayette Utilities System (LUS) needed to upgrade the communications to its electrical substations. After some research and with the urging of our Chamber of Commerce, it was decided that Fiber Optics would be the choice that gave Lafayette the best infrastructure for the future. Once in place, we had a 65 mile fiber loop installed around our city. This gave LUS the opportunity to provide wholesale broadband services to larger businesses in our area. So, when I took office in January of 2004, LUS was already successful in providing these wholesale services.

But, we knew we could do more. One of my first acts in office was to authorize a feasibility study on taking the concept to the next level of public discussion. Having come from the private sector, my first thought was why we would want to compete with something the private sector was doing. However, as I educated myself, my thought was "shame on us if we don't at least look into this." I told my staff that we would move forward until we ran into a hurdle we couldn't jump over. The feasibility study was made public around March of that year, the public discussions began and the hurdles began sprouting up; but none that stopped us. I was visited by our cable and phone companies. I asked, in fact begged them to do it so we wouldn't have to. But we received the same answer Lafayette received in 1896 when the private utility companies chose not to install that new infrastructure called electricity. "It makes no sense in an area the size of Lafayette." We started informing our community and council. And they started misinforming. Ultimately, the message to our community was that if we didn't do it, we were not going to get it, just like in 1896.

With America falling so quickly behind the rest of the world, we could either lead or we could wait for others to tell us when it was convenient for them. Lafayette chose to lead with a 62% to 38% vote of our citizens. We were dragged through court

and ultimately ended up winning a unanimous decision at the Louisiana Supreme Court. This delayed us two years, and don't forget our citizens had voted overwhelmingly for it!

When people ask me how we did it, my simple answer is that we told the truth. You see, what I learned was that we in local government are held to a different standard than the telecom giants. We have to tell the truth. Fortunately for Lafayette our citizens saw through good old boy tactics that don't work like they used to. Our citizens were much smarter than they were given credit for, and today, we are installing our fiber to the premise infrastructure and will begin serving our community by January of 2009. And, while we're at it, we are putting up wireless antennas for our emergency services, and we will eventually open it up to our citizens. Because they are all connected to our fiber, the consultants tell us we will have the most robust wireless system in America.

And we will have things that no one else in America has, and in fact I would say that 80% to 90% of America won't have some of what we will have 25 years from now. That is unless we can remove these barriers to entry to prevent what we are doing. Our customers, when communicating with each other, will get not 1 or 2 mbps, but we will open up the pipe to them, and they will have 100 mbps at their disposal. Actually, I often say with tongue firmly planted in cheek that I hope that the other 49 states do outlaw what we are doing. Then I will ask them to send their technology companies to Lafayette, where we will welcome them with open arms and a big pot of gumbo.

The language included in Title II of the discussion draft provides all communities the ability to provide these services, as we have in Lafayette, if they so desire. This language is virtually identical to H.R. 3281, the Community Broadband Act, introduced by Representatives Rick Boucher (D-VA) and Fred Upton (R-MI). It provides safeguards from potential conflicts, it requires public input on top of an already very open process of municipal government. This same language was vetted through both chambers back in the 109th Congress and was included in part of the large telecommunications package that passed the full House of Representatives and passed out of Senate Commerce Committee. Already this year, identical standalone language, S. 1853 sponsored by Senators Frank Lautenberg (D-NJ) and Gordon Smith (R-OR), was passed by voice vote out of the Senate Commerce Committee.

On behalf of APPA and my community of Lafayette, we urge the subcommittee to mark up and approve the provisions of Title II of the discussion draft as soon as possible.

Thank you for allowing me to be here today. I look forward to your questions.

Mr. MARKEY. Thank you, Mr. Durel. And I can tell you honestly that it was greatly upsetting to us when the rankings came out and we in Boston were number 2 to Berkeley on the list of most liberal communities. But on this question of competition, I am in violent agreement with Lafayette in terms of the need to put aside ideology to work on the issue of ensuring that we have the maximum broadband deployment. Let us now turn to one of our most distinguished, one of our greatest alumni from this committee, Steve Largent, who is the President and Chief Executive of CTIA, The Wireless Association. He is a former member of this committee and a frequent visitor. We welcome you back, Steve.

STATEMENT OF STEVE LARGENT, PRESIDENT AND CEO, CTIA, WASHINGTON, D.C.

Mr. LARGENT. Thank you, Chairman Markey. It is a pleasure to be here. I can't tell you how thrilled I am to be testifying before this subcommittee today. We have been working for a long time to get legislation introduced like you have here before us today. That doesn't mean to say that we think it is perfect. We think we can make some improvements on along the process, but we are thrilled that you have introduced this legislation and thrilled to be here today and want to thank you and your staff for the hard work that they have done to get this before this subcommittee.

I want to say that the wireless industry continues to be one of the great consumer and economic success stories of the 21st Century. It is happening in large part because in 1993 this subcommittee gave the industry a green light in the form of the current national framework for entry and rate regulation. As a result, we have both regional and national competitors offering service with national regulation on rates and entry designed to ensure that a company's fortunes rise and fall based on one thing, whether it satisfies customers. But this success is now threatened because some states are exploiting the other terms and conditions clause of the Act to override national rules with rules of their own.

If they are successful the result will be a patchwork of conflicting state-by-state regulations, and consumers are going to be left holding the bag. You simply can't regulate wireless in one state and have the effect of those regulations suddenly stop at the border of the next state. I can't emphasize this enough, inconsistent regulation by even a few states threatens the pro-consumer benefits that emerge once wireless stopped being local and started being national. The efforts of a few should not threaten a system that works so well for the many. Unless the subcommittee acts to protect the regime you set up in 1993, wireless companies will soon have to spend less time serving consumers and more time keeping up with the latest changes to multiple sets of rules, and we fail to see how that really helps consumers.

Congress can put a stop to this by closing the other terms and conditions loophole and finishing what you started by extending the current national framework to consumer protection standards. In a relatively short time, wireless has gone from novelty to necessity. Americans pay less for service than consumers in other countries do, and as prices have fallen they talk more. CTIA member companies have come to serve more than 250 million customers, carry more than 1 trillion minutes of traffic a year, and support more than 600 different kinds of wireless devices doing things that were to previous generations science fiction.

The economic impact of all this is just as amazing. Since 1993, wireless companies have invested more than a quarter of a trillion dollars in infrastructure and spectrum and created more than 4 million U.S. jobs, with an additional 2 million to 3 million jobs and $450 billion in gross domestic product forecasted for the next decade, and we have achieved all of this despite the fact that the U.S. allocates far less spectrum per wireless user than our main economic competitors, even after the completion of the 700 megahertz auction.

CTIA applauds the provisions in the staff draft that would move us towards additional allocations of spectrum for commercial usage. Consumers have done so well because Federal regulation promoted this kind of vigorous national competition. If one of CTIA's members doesn't satisfy the customers, their competitors will, so our members work very hard to give their customers what they want. In 2003, we introduced a 10-point, CTIA consumer code for wireless service to ensure fair marketing and transparent billing. We protect our customers' privacy by prosecuting pretexters and identity thieves. We secured injunctions against text message spammers. We have gone after telemarketers who mask their identities using

spoofing. We created a national recycling program that keeps old phones and technology out of landfills and gives them to charity groups for distribution.

We have launched a nationwide wireless Amber Alert program to help keep America's children safe. But we haven't stopped there. For example, many of CTIA's member companies have adopted extended trial periods upon hearing from consumers that this is important to them. Several carriers have also decided to prorate early termination fees, again in response to learning that consumers value this. And just last week multiple carriers announced flat rate all-you-can-talk plans. When consumers make a demand, wireless companies have no choice but to say OK.

Wireless carriers live in a "what have you done for me lately" sort of world, and the companies that thrive understand that. Americans have come to rely on wireless phones first as safety devices, then for convenience, and now as an integral part of daily life. The system you created makes that possible, and it works very well. On behalf of wireless carriers serving all American consumers, we ask you to keep it working by closing the other terms and conditions loophole and to extend the national framework to consumer protection standards. I thank you, Mr. Chairman, and look forward to your questions.

[The prepared statement of Mr. Largent follows:]

STATEMENT OF STEVE LARGENT
PRESIDENT & CEO, CTIA-The Wireless Association®

BEFORE THE SUBCOMMITTEE ON TELECOMMUNICATIONS AND THE INTERNET

February 27, 2008

Good morning, Chairman Markey and Members of the Subcommittee. It is a privilege to be here this morning. Thank you for affording me this opportunity to share with you the views of CTIA on the staff discussion draft Wireless Consumer Protection and Community Broadband Empowerment Act of 2008.

I want to make two overall points in my testimony today.

First, the wireless industry is one of the greatest consumer and economic success stories of the 21st Century. The industry began in the early-1980s when the Federal Communications Commission (FCC) authorized two companies per market to compete with each other to provide analog voice service. States exercised significant regulatory oversight of the industry, imposing obligations on everything from billing format to rate levels. Coverage was spotty, voice quality was poor, and prices were high.

Today, 25 years later, CTIA member companies serve more than 250 million consumers, carry more than 1 trillion minutes of use on their networks every year, and give Americans of every race, age and income level access to more than 600 different kinds of wireless devices including digital cameras and camcorders, Internet access devices, computer modems, video and television receivers, tape recorders, and calculators. American wireless consumers can use these devices to make voice calls,

receive live television broadcasts of critical news developments, send and receive e-mails and attachments, check local traffic reports, locate the cheapest gas station, send text and picture messages, download music and videos, ring-tones, ring-back tones, and hundreds of additional applications developed by thousands of entrepreneurs that are unaffiliated with any wireless carrier. The biggest success for American consumers however, is the fact that they have unparalleled choice at the same time they are enjoying some of the lowest prices in the world for the services they want.

The cost per voice minute, which was about one dollar twenty years ago, has dropped to *4 cents* today. According to the Bureau of Labor Statistics, prices for commercial wireless services have fallen more than 35% since December 1997.[1] During the same period, the average minutes of use ("MOU") per subscriber increased six-fold, from an average of 120 MOU per month to an average of 746 MOU per month.[2/] Statistics and realities like the ones I just highlighted put the United States at the forefront of the global, mobile wireless revolution. A revolution you say? According to a story in this Sunday's Washington Post, "we've passed a watershed of more than 3.3 billion active cellphones on a planet of 6.6 billion humans

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1 *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, Twelfth Report, FCC 08-28, WT Docket No. 07-71, ¶ 198 (rel. Feb. 4, 2008) ("*Twelfth Annual CMRS Report*").

2 *See CTIA Wireless Industry Indices, Semi-Annual Data Survey Results: A Comprehensive Report from CTIA Analyzing the U.S. Wireless Industry, Midyear 2007 Results* (rel. November 2007) at Section 3.5, pp.197-198 ("*CTIA Wireless Industry Indices report*")..

in about 26 years. This is the fastest global diffusion of any technology in human history - faster even than the polio vaccine."[3]

How did the U.S. success story occur? In 1993, Congress established, "a Federal regulatory framework to govern the offering of all commercial mobile services."[4] Congress deemed a national framework necessary to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure."[5] This national regulatory environment attracted the investment needed to build the infrastructure and purchase the spectrum that has produced the consumer benefits outlined above.

Since 1993, wireless companies have invested more than $220 billion dollars to first deploy and then upgrade local, regional and national wireless networks, and billions more to obtain the spectrum needed to continually increase network capacity and enable the carriers to provide consumers with the most reliable, comprehensive wireless coverage in the world. In the process, the wireless industry has directly created hundreds of thousands of jobs and contributes billions of dollars annually to the U.S. Gross Domestic Product.[6]

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3 Joel Garreau, "Our Cells, Ourselves," The Washington Post, February 24, 2008, at p.M1 ("Garreau").

4 H.R. CONF. REP. No. 103-213, 103d Cong., 1st Sess. at 490 (1993).

5 H.R. REP. No. 103-111, 103d Cong., 1st Sess. at 260 (1993).

6 Roger Entner and David Lewin, *The Impact of the U.S. Wireless Telecom Industry on the U.S. Economy*, Ovum-Indepen, September 2005.

The second point I want to make is that Congress should now finish the job begun in 1993 by extending the national wireless framework to include consumer protection standards, not just rate and entry regulation. The state of America's wireless industry today is exactly what this Subcommittee and Congress hoped for when you wisely decided in 1993 to treat our industry differently from traditional landline telephony. No one can argue that this far-sighted approach has worked far better than anyone envisioned at the time. The enormous economic growth we've spurred and the incredible yet affordable technology we have delivered to consumers is just the beginning of what the wireless industry can do for consumers, and should be celebrated.

Unless Congress acts, however, providers of wireless services will find themselves hamstrung by a costly, anti-consumer patchwork of state-by-state utility-style regulation. Since 1993, and most recently in the last 10 years, some states have been trying to use the "other terms and conditions" clause as a way to get around Congress' restriction on the regulation of rates and entry, disguising their efforts as so-called "consumer protection" legislation and regulation.

We are not fooled by these thinly veiled efforts and we do not think you will be either. It is unrealistic to think that wireless consumers will receive more and better value from aggressive new state-specific regulatory schemes that have more in common with the utility-style, monopoly regulation of a hundred years ago than with the dynamic, competitive wireless marketplace of the 21st Century. Diverting manpower and economic resources away from what we should be focusing on – the roll-out of ubiquitous wireless broadband and providing consumers with more of the

creative applications, devices and services they indicate they want, at prices they can afford – seems a fool's errand.

We believe there is an urgent need for you to close the "other terms and conditions" loophole once and for all, and create a clear, national regulatory framework for all wireless consumers in all states. As presently drafted, the Staff Draft falls short of this objective because its preemption and enforcement provisions are insufficiently clear and thus are likely to lead to protracted debates over their scope and interpretation. This would undermine the notion of a uniform, national framework and risk that states would be encouraged to add their own layer of regulation on top of the federal regime. This will disserve the very purpose you are trying to achieve – enhancing a uniform, national set of consistent consumer protections for all wireless consumers. Additionally, the well-intentioned elements in the Staff Draft addressing consumer protection issues are so prescriptive we believe they will result in the very anti-consumer problems some of the state specific proposals have been creating. With modifications, we believe a balance can be struck that promotes the clarity and consistency that consumers seek, while providing carriers with the certainty they need to continue investing and competing for consumers' attention and loyalty.

I. VALUE, CHOICE and INNOVATION: THE U.S. WIRELESS CONSUMER IS IN CONTROL

In 1993, Congress had the forethought to establish a national framework for the wireless industry which led to the explosive growth in innovation, competition, investment and consumer benefits I just summarized for you. The Federal

Communications Commission (FCC) recently reported to you in its *Twelfth Annual CMRS Report* that "U.S. consumers continue to experience significant benefits – including low prices, new technologies, improved service quality and choice among providers – from competition in the CMRS marketplace."[7] I would like to elaborate on the three characteristics – value, choice and innovation - that distinguish my industry from others serving the American consumer.

Value. An analysis of usage and revenue trends over the past decade demonstrates that wireless consumers today pay less for more service than they ever have. As noted above, the BLS reports that prices for wireless services have fallen more than 35% since December 1997.[8] This means American wireless customers can afford to use their devices and services to do more things and satisfy more needs. And they are unquestionably better off than their European counterparts. For example, between 2001 and 2005, average MOUs in the U.S. grew more rapidly than in any European country. Specifically, by the end of 2005, MOUs in the U.S. were almost three times larger than in the largest EU country. And the price per minute paid by consumers has fallen faster in the U.S. than in major European countries.[9]

Choice of Providers. Further, U.S. consumers have more choice among service providers, handsets and innovative pricing plans than any other wireless consumers in the world. More than half of the U.S. population is served by **FIVE**

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7 *Twelfth Annual CMRS Report* at ¶ 1.

8 *Id.* at ¶ 198.

9 Marius Schwartz and Federico Mini, *"Hanging up on Carterfone: The Economic Case Against Access Regulation in Mobile Wireless,"* May 2, 2007, at 14.

OR MORE facilities-based wireless carriers, 90 percent is served by **FOUR OR MORE** and 95 percent is served by **THREE OR MORE.**[10]

In the U.S. wireless market, ten facilities-based wireless carriers serve more than 1 million customers. By contrast, just two companies serve more than 70 percent of the population in each of the top ten OECD countries outside the U.S., excluding Canada and the U.K. As the U.K.'s telecommunications regulator – Ofcom – notes in a 2006 report: the United States has a much less concentrated market when viewed through the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration.[11]

Choice of Handsets, Service Plans and Pricing Options. America's wireless consumers have a choice of more than 600 wireless devices today that they can purchase from service providers, independent retailers and manufacturers. By comparison, U.K. wireless subscribers only have access to approximately 180 different handsets.[12]

America's wireless consumers also have a dizzying array of service plans to choose from. In fact, my industry has been criticized for offering American consumers too many choices, hardly the hallmark of a non-competitive, anti-consumer industry. To the contrary, consumers drive my member companies to find more ways to compete against each other. For example, CTIA member companies

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10 *Twelfth Annual CMRS Report* at ¶ 38.

11 Ofcom, *The International Communications Market, 2006*, November 2006, available online at http://www.ofcom.org.uk/research/cm/icmr06/icmr.pdf, at p.68 (last accessed Jan. 4, 2008).

12 Based on a review of the websites of the U.K. network operators, service

have introduced extended trial periods after hearing from their customers that that was important to them. Several wireless carriers have also decided to pro-rate their early termination fees when a customer cancels their contract early, again in response to learning from their customers that this was important to them.

In just the last three weeks, AT&T Mobility, T-Mobile, Verizon Wireless and U.S. Cellular have all rolled out flat-rate, "all you can eat" voice plans, continuing the trend of offering tailor-made, creative pricing plans that AT&T Wireless started back in the late 1990s when it first introduced the Digital One Rate plan. I would note that AT&T introduced the concept of "bucket pricing" following the FCC's decision to grant CMRS carriers pricing flexibility, another example of the very real benefits consumers receive when companies are not constrained by heavy-handed, anti-consumer regulation.[13] Now, wireless consumers have routine access to family plans, prepaid and pay-as-you go options, on-net and off-net calling circles, roll-over minutes, local-only and big-bucket plans – the list can go on of the variety of pricing and other consumer-friendly service plan options wireless carriers have devised as a way to compete for customers.

Innovation. The vibrant competition – some might call it "hand to hand combat" – that is unquestionably the hallmark of the wireless industry has fostered

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providers, and retailers (*e.g.,* Carphone Warehouse, Tesco, etc.).

[13] *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, 1510-11 (1994). *AT&T Launches National One-Rate Wireless Plan*, COMMUNICATIONS TODAY (May 8, 1998).

innovation that is unparalleled in other sectors of the telecommunications marketplace.

Innovation is obvious not only in the hundreds of new devices, features and applications that consumers can obtain pretty much wherever they are, but also in the deployment of new technologies that allow them to wirelessly access the Internet, send and receive data, watch video, take and send pictures, all while feeling secure in the fact that their service is reliable, of good quality and working at ever faster speeds. As I noted earlier, our carrier members have invested and continue to invest billions of dollars in network upgrades to move from second generation (2G) to third (3G) and soon fourth generation (4G) broadband wireless services that will give American consumers affordable access to more and faster services and applications – making telemedicine, distance learning and other consumer-focused initiatives a reality.

II. ECONOMIC IMPACT

In addition to delivering tremendous benefits to American consumers, the explosion of demand for mobile wireless services and the carriers' rapid deployment of faster and more robust commercial wireless networks to address that demand has had a very real impact on the U.S. economy. An economic impact study conducted two years ago by Ovum, a research firm, found approximately 3.6 million U.S. jobs were directly or indirectly dependent on the U.S. wireless industry, and that an additional 2-3 million jobs will be created in the next 10 years. The same study shows the wireless industry generated $118 billion in revenues in 2004 and contributed $92

billion to the U.S. Gross Domestic Product. Ovum estimated that, over the next 10 years, the U.S. wireless industry will generate gains of more than $600 billion from the use of wireless data services, and will add another $450 billion to the GDP.

III. WIRELESS CONSUMERS SPEAK AND COMPANIES LISTEN

U.S. wireless carriers do more than provide reliable, quality mobile wireless services and devices to consumers at prices they can afford. My member companies strive to satisfy customer demand and address consumer concerns in many additional ways. For example, in September 2003, the wireless industry unveiled a ten point "CTIA Consumer Code for Wireless Service," a set of detailed best practices that CTIA member carrier companies agreed to follow when marketing their services and billing customers. National, regional and local wireless service providers serving 95 percent of wireless customers are signatories of the CTIA Consumer Code.

Our carriers also expend considerable resources to protect customer privacy by prosecuting pretexters who were trying to illegally obtain and sell confidential customer telephone records and obtaining injunctions against spammers who send text message solicitations to wireless customers. Wireless carriers also have gone after telemarketing companies and individuals who used pre-recorded messages in Spanish as well as techniques and technology to mask the origin of the call, known as "spoofing."

And there is more. In 2005, wireless carriers launched a nationwide Wireless AMBER Alerts program that allows wireless subscribers to opt-in, for free, to receive Wireless AMBER Alert messages for their designated areas. Carriers also have developed and launched a national wireless recycling program through which

millions of handsets and accessories have been collected and either recycled or refurbished, with hundreds of thousands of handsets being donated to charitable organizations.

As a result of pro-active, pro-consumer initiatives like these, and the unparalleled value and choice American wireless consumers have, consumer complaints about wireless are few. According to the most recent data released by the FCC, only 26 wireless consumers per million have complaints about their wireless service.[14] Of these complaints, just 1.3 consumers per million complained about contract issues.[15] Further, as the FCC has just demonstrated, the FCC is fully capable and committed to making sure wireless carriers respond promptly to consumer complaints.[16] This data belies the unfounded "findings" set forth at the beginning of the Staff Draft. It is extremely important that the Subcommittee not rush head-long into ill-considered legislation based on misleading extrapolations and insinuations.

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[14] Revealed by comparing the complaint statistics reported by the FCC's Consumer & Governmental Affairs Bureau "Quarterly Reports on Informal Consumer Inquiries and Complaints," rel. January 14, 2008, compared against estimated wireless subscribership as of June 30, 2007.

[15] *Id.*

[16] *See* In the Matter of AT&T, Inc., *Notice of Apparent Liability for Forfeiture*, File No. EB-08-TC-1066, (DA08-428), rel. February 19, 2008; In the Matter of Alltel Wireless, *Notice of Apparent Liability for Forfeiture*, File No. EB-08-TC-1062, (DA08-427), rel. February 19, 2008; In the Matter of Sprint Nextel Corporation, *Notice of Apparent Liability for Forfeiture*, File No. EB-08-TC-1068, (DA08-417), rel. February 19, 2008; and In the Matter of Cricket Communications, Inc., *Notice of Apparent Liability for Forfeiture*, File No. EB-08-TC-1064, (DA08-420), rel. February 19, 2008.

IV. THE CONSUMER SUCCESS STORY LAUNCHED IN 1993 IS AT RISK

Despite the tremendous consumer benefits outlined above, and the apparent satisfaction of a majority of wireless consumers with their services and devices, some states are renewing efforts to turn back the clock and regulate wireless service as a public utility.

We were encouraged when the National Conference of State Legislators (NCSL) recently passed a very important resolution recognizing that wireless is uniquely well-suited for federal oversight, rather than state-by-state regulation.[17] Notwithstanding this clear policy preference articulated by state lawmakers, some state regulators have resisted their own legislatures' call for a national framework. Just last week, the Board of Directors of the National Association of Regulatory Commissioners (NARUC) decided to defer action on a "national framework" resolution approved by its own Telecommunications Committee.[18] We were

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[17] "[I]n carrying out its consumer protection functions government must acknowledge the interstate nature of the wireless industry. **Specifically targeted government requirements ... that may vary from jurisdiction to jurisdiction while may be well meaning, will hinder the seamless provision of these services, resulting in confusion and increased costs for all customers especially for those that are not residents of the state that has taken action.**" Resolution, National Conference of State Legislatures, Twenty-First Century Communications, at 7 (November 30, 2007) (emphasis added), http://www.ncsl.org/standcomm/sccomfc/sccomfc.htm and http://www.ncsl.org/print/standcomm/sccomfc/CommPolicyState-fall%2007.pdf.

[18] *Communications Daily*, "NARUC Stops Wireless Consumer Resolution Cold; Sends It Back to Committee, at 6 (Feb. 21, 2008).

disappointed to see an organization representing state utility regulators refuse to follow the lead of their own state legislatures, but we are encouraged by the bold steps taken by NARUC's Telecommunications Committee. We remain optimistic that the views of the majority of the NARUC Telecommunications Committee members who supported the resolution will prevail when the matter is considered again this summer.

Some of the opponents of the national framework misapprehend the wireless industry's position regarding the appropriate balance between the federal and state roles. Let me be clear: we have *never* argued that the states should have no role. The issue is not whether states should play a consumer protection role regarding the wireless industry. Of course they should. For example, the wireless industry is subject to the jurisdiction of the state attorneys general in all 50 states, as evidenced by the "Assurance of Voluntary Compliance" entered into by some 33 attorneys general and Cingular (now AT&T Mobility), Verizon Wireless and Sprint Nextel, establishing national, uniform consumer protection standards.[19] States should exercise their role in consumer protection to the same extent they do for other competitive industries, no more and no less, by enforcing generally applicable consumer protection laws, but *not* through the promulgation of wireless-specific economic regulations.

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[19] Attorneys General from the following states are signatories to the AVC: Alabama, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Virginia, Wisconsin and Wyoming.

It has been well documented by experienced, peer-reviewed economists and policy experts that a patchwork of monopoly-style, state public utility regulation will thwart the investment, innovation, and job creation that has brought so much benefit to wireless consumers since 1993. The experts agree that regulatory policies for a service like mobile wireless do not impact just the consumers of the state where the regulation is enacted. Rather, state-by-state regulation of what is essentially a national service transcends geographic boundaries creating confusion AND drive up prices for wireless services of all consumers, not just consumers living in the state where state-specific regulation is enacted. This result strongly argues for policy-making at the federal level to ensure that the occasional frustrations of the few do not undermine what is working very, very well for hundreds of millions of Americans.[20]

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[20] See, *e.g.*, former FCC Chief Economist, Michael L. Katz, *"The Consumer Benefits of a Consistent Regulatory Framework for Wireless Service Providers' Billing and Disclosure Practices,"* January 2006, at 5. As noted by former FCC Chief Economist, Tom Hazlett, "A regulatory environment that differs from state-to-state can erode a provider's ability to offer cost-efficient service through uniform national service and pricing plans." T.W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?* 56 FED. COMM. L.J. 155, 176 (2003); *see also*, Declaration of Harold Furchtgott-Roth, *"In the Matter of CTIA Petition for Expedited Declaratory Ruling on Early Termination Fees*, Federal Communications Commission, WT Docket No. 05-194, at 39. ("Ironically, state efforts to impose economic regulation of wireless services by restricting rates or limiting contract terms will merely increase incentives for consumers to avoid those regulations by purchasing services in other states."); "State and local regulation in the wireless industry has the tendency to spill across borders. When regulation in one jurisdiction has substantial effects in other jurisdictions, consumers and society can be worse off if local regulation is permitted to occur—*even if state and local governments act as efficient regulators* for their own jurisdiction." George S. Ford, Thomas M. Koutsky and Lawrence J. Spiwak, *An Economic Approach to Evaluating a National Wireless Regulatory Framework*, PHOENIX CENTER POLICY BULLETIN No. 19 (Oct. 2007), at 2.

States typically regulate monopolies and utilities, not competitive services like the Internet which transcend geo-political boundaries. Wireless is no different. We are not asking for special treatment, only the same treatment accorded other competitive, non-geographically constrained businesses and services.

V. CONGRESS SHOULD CLOSE THE "OTHER TERMS AND CONDITIONS" LOOPHOLE AND FINISH THE JOB OF ESTABLISHING A TRULY NATIONAL WIRELESS FRAMEWORK

We welcome your effort to finish the process you began 1993 by establishing a national consumer protection framework that complements the national regulatory framework that has served wireless consumers and the U.S. economy so well over the past 15 years. This is a difficult challenge and one that needs to balance a desire to legislate a clear and consistent set of protections with the need to avoid unintended, anti-consumer consequences.

We have several serious concerns with the staff draft circulated earlier this month. For example, the provisions regarding ETFs would effectively require the FCC to develop cost-based schedules for each combination of carrier charges, contract length, and handset pricing, and would result in protracted legal wrangling over the appropriate methodology for determining the "cost" of a device or subsidy. The scope of the regulatory quagmire that would result from having to arbitrarily establish a cost-based schedule for wireless devices - when the prices for both service and devices, like other electronics devices, are characterized by rapidly falling prices - would surely bring the pace of innovation in billing and service plans to a grinding halt. There are several other provisions in the draft that could result in similar, unintended consequences. Therefore, my staff and I look forward to working with all

Members of the Subcommittee to extend the pro-consumer, pro-competitive paradigm you created in 1993.

Making the national framework applicable to all aspects of wireless services would not grant wireless carriers something different from other competitive businesses. Rather, it would harmonize regulation. And, it would continue to rely on the effective and successful combination of consumers exercising their right to choose the provider that best suits their needs, and carriers competing to keep their consumers happy, as the best way to drive providers to be more innovative and accountable.

VI. THE WIRELESS CONSUMER SUCCESS STORY IS CONTINGENT UPON ADDITIONAL ACCESS TO SPECTRUM AND THE ABILTY TO DEPLOY THE FACILITIES NEEDED TO USE IT

CTIA is pleased to see that the bill includes a Title that begins to deal with the problem of spectrum scarcity. U.S. wireless carriers today do more with less than do carriers in almost any other nation in the world. Of the top ten OECD markets, only three - South Korea, Canada, and Mexico - have allocated less spectrum for commercial wireless and are serving far fewer subscribers than in the U.S. We do not want to be on the bottom of such a list.

Even if you include the not as yet operational Advanced Wireless Service spectrum and 700 MHz spectrum in the calculation, each MHz of spectrum allocated for commercial wireless use in the United States serves nearly 828,000 customers (on a MHz-POP basis). If you exclude the newer bands that are not currently in use, that number is even higher. This intensely efficient spectrum usage contrasts starkly with

the practices in other countries, such as in the U.K. which has allocated more spectrum to serve fewer consumers, resulting in a subscriber density of only 202,000 subscribers per MHz of spectrum. U.S. wireless carriers have learned to be as much as four times as efficient as their foreign counterparts. That is the good news.

The bad news is that we face a very real risk that spectral efficiency alone may not be enough to enable U.S. wireless carriers to keep pace with the increasing demands of American consumers for more and faster services. The bill provides a first step towards helping the wireless companies serve American consumers with the best, fastest and most secure wireless networks in the world. I hope that the Subcommittee will lead the way to taking the next step, which is actually allocating additional spectrum for commercial use.

While America's wireless carriers will have an ongoing need for access to additional spectrum, the utility of this critical input can be maximized only if carriers can deploy the facilities necessary they need to serve consumers. Tower siting continues to pose challenges in jurisdictions from Maine to California. For carriers of all sizes, the process of gaining siting approvals is often too long, with a decision-making process that can vary widely from one jurisdiction to another. There are three reasons why CTIA is concerned about this issue.

First, the FCC's adoption of aggressive "use it or lose it" build-out mandates in the 700 MHz service rules mean that carriers that win licenses in the current auction will need to be able to site and build facilities expeditiously or face the prospect of forfeiting spectrum. Second, the success of the emergency alerts effort created by the WARN Act, as well as carriers' ability to provide reliable coverage to public safety

officials who often rely on commercial networks, depends on carriers' ability to provide gap-free coverage. And third, beyond price, coverage and reliability - measures indirectly addressed by the Staff Draft's provisions on coverage maps and service quality monitoring - are the features most important to consumers, but carriers cannot ensure ubiquitous, reliable coverage without the ability to site towers where and when they are needed.

With some modest fine tuning, the balance struck on this issue 12 years ago can be improved in a way that will benefit all of those who depend on America's wireless networks. CTIA urges the Subcommittee to streamline and standardize the siting process as you move forward with revisions to the Staff Draft.

CONCLUSION

We are at a crucial juncture in the development of the nation's wireless industry. Over the past decade and a half, more than 250 million American wireless consumers have come to expect and rely on their wireless phones, first as a safety device, then as a convenience. It may seem like magic, but the work of hundreds of thousands of dedicated men and women every day help build, maintain and expand robust and secure wireless networks - and provide customer service - enabling more than 250 million consumers to use our products and services every day. CTIA commends you, Chairman Markey, for opening the dialog on writing a new chapter for the national wireless framework that has proven so successful in the past, and we look forward to working with the Subcommittee to craft a policy that serves the needs of consumers and carriers alike.

Mr. MARKEY. Thank you, Steve, very much. Our members will have to go over and cast a vote on the House floor. There is 6 minutes left to go on that roll call, so we will recess for about 15 minutes, and when we come back, Dr. Darby, we will recognize you.

[Recess.]

Mr. MARKEY. We thank you all for your patience. The hearing is ready to recommence, and we will just wait another 10 seconds so that people can regain their seats. And at this point I will introduce our third witness, Dr. Larry Darby, who is a board member and Fellow of the American Consumer Institute of Consumer Research. He is also the former chief of the FCC's Common Carrier Bureau. Welcome, Dr. Darby. Whenever you are ready, please begin.

STATEMENT OF LARRY F. DARBY, PH.D., THE AMERICAN CONSUMER INSTITUTE, WASHINGTON, D.C.

Mr. DARBY. Good morning, Chairman Markey and Ranking Member Stearns. I really appreciate the opportunity to come and share my views on this important bill. I should say just a little bit about the institute. We are a new 501(c)(3) non-profit, nonpartisan group. We were started in 2005, and our basic goal is to promote careful consumer welfare analysis applied to legislative and regulatory proposals, of which this qualifies. The staff discussion draft has enormous implications for consumers as users, as taxpayers, and as citizen stakeholders in the information economy. I don't have much time. I am going to go fast. I will have to address selectively. I am going to talk about 5 points.

First, we urge that all proposed regulations, this included, be subjected to a rigorous consumer welfare analysis of the costs and benefits. Our experience is that such tests are simple in principal but they are very demanding to apply and too often ignored. Good intentions are important, but they do not substitute for benefits actually delivered and costs avoided. Accurate cost benefit analysis of markets and government action are absolutely critical in this instance, since the draft opens the door to government action to address presumed market imperfection. As others have pointed out, the facts of wireless market performance suggest that the current mix of regulation and markets is working pretty well. FCC and OECD data indicate U.S. consumers compared to those in the rest of the world enjoy more choices, more competition, high usage rates, low cost. Costs per minute are declining, average use is increasing, penetration is high and rising.

J.D. Powers, the FCC, the Better Business Bureau data indicate steadily improving service quality, and importantly J.D. Powers reports that consumer satisfaction in the sector is at an all-time high. International comparisons are not always reliable, but by any reasonable assessment the U.S. wireless sector and its regulators have a remarkable success story to tell. For certain, and I concede this, performance is not perfect, and a lot of consumers register complaints, but the current government industry partnership is certainly not broken.

Second, consumer welfare is served by full disclosure of terms and conditions associated with commitments by both parties and service contracts. We regard this as the central premise of the bill,

and we support it strongly. Rational consumer choice and welfare depend on complete, accurate information about their options. Inadequate, imperfect, misleading, poor, bad information is a sign of market failure and a widely accepted basis for targeted government intervention. The CTIA consumer code appears to us to be quite responsive to consumer needs and in some ways appears to exceed the requirements in the draft.

The Committee, I think, might usefully compare the staff requirements with those in the CTIA code. I point out that rivalry in wireless markets will continue to be marked by increasing quality of service improvements and service differentiation. Customer dissatisfaction that many of you have cited is a source of churn and the loss of market share. Service rivalry in the sector is very likely to accelerate in the future and add some substantial consumer value.

Third, we commend the draft's intention to, 1, clarify consumer protection requirements, and 2, to nationalize fully and clearly their definition and enforcement. The national framework put in place in 1993 homogenized economic regulation of the sector across the country. It has worked well and should be credited for the substantial performance gains we enjoyed. That jurisdictional framework in our view should be replicated as needed to assure adequate consumer protection in this environment. Now, we recognize legitimate state interest in protecting consumers, but we also note that state regulation poses risk. First, well-meaning consumer protection rules we are concerned may morph in the direction of full scale rate and service regulation of the kind we have avoided for the last 15 years.

Second, consumers ultimately pay all the added cost of regulation. We should recognize that, and there are many. Third, since users are mobile and carriers are interstate in nature, we are concerned that the cost of individual state regulation will almost certainly leak and burden users nationwide and in other parts of the country. We emphasize again that economic cost benefit studies that we have seen of state and Federal consumer protection provide no consumer welfare basis for permitting to emerge a mosaic dappling of consumer protection issues or schemes.

Fourth, we are very concerned that regulators, and this is a personal note for me as a former regulator, we are very concerned that regulators might find support in Federal legislation for rate service or consumer protection regulation based on cost of service. The recent history of service regulation in the wireline sector and my experience as chief of the Common Carrier Bureau is filled with a number of serious danger signs and very, very few successes. We have seen no credible evidence that cost-based consumer protection rules in the wireless sector would create consumer value.

Finally, we are uneasy about the local government network competition with investor-owned operators. I certainly see the point of view. We as U.S. advisors have for many years lectured other governments on the need to privatize and the dangers of private capital formation for tax funded competition. I have more, but I thank you again for the opportunity, and I look forward to your questions.

[The prepared statement of Mr. Darby follows:]

Statement of Dr. Larry F. Darby
On Behalf of
The American Consumer Institute for Citizen Research
Before
the Sub-Committee on Telecommunications and the Internet
February 27, 2008

Good morning Mr. Chairman and members of the Committee. Thank you for inviting me to share the views of The American Consumer Institute for Citizen Research, which I serve as both a board member and a Fellow. The Institute is a 501-c-3 organization founded in 2005 for the purpose of promoting careful analysis of the impact of legislative and regulatory proposals on consumers' economic welfare.

The discussion draft of the Wireless Consumer Protection and Community Broadband Empowerment Act of 2008 has substantial, but sometimes inestimable, implications for consumers as users, taxpayers and citizen stakeholders. Time requires me to be selective in addressing its provisions; and, with consent of the Committee we would like the opportunity to provide more extensive comments subsequently for the record.

Meanwhile, I want to make five points.

First, we urge you to subject all proposed regulations to a rigorous analysis of consumer costs and benefits. The test is simple in principle, but often demanding to apply, and frequently ignored. Applying it requires comparison of completely assessed consumer costs and benefits associated with the proposal. Good intentions are important, but they do not substitute for benefits actually delivered and costs avoided.

We raise this because the draft opens the door to regulatory solutions that presumably address market imperfections. Our general sense, however, derived from a wide variety of public information, is that U.S. wireless markets and the current regulatory schemes are working very well as measured by reasonable standards. We note that:

- Based on FCC and OECD data, U.S. consumers, compared to those elsewhere in the world, enjoy more choices, more competition, the highest usage rate, and low rates. Costs per minute are declining, average use is increasing, and penetration is high and rising.
- Data from J.D. Powers, the FCC and Better Business Bureau indicate that wireless service quality is steadily improving. J.D. Powers reports that overall consumer satisfaction is at an all time high.

There is more, and international comparisons are not always dispositive, but by most measures and any reasonable assessment, the U.S. wireless sector, and its regulators,

have a remarkable success story to tell. Industry performance is not perfect, but the current partnership between government and industry is not broken.

Second, consumer welfare is enhanced by full disclosure of terms and conditions associated with commitments made by them and the carriers in service contracts. Rational consumer choice and welfare depend on complete and accurate information about their options. Inadequate information is a key cause of market failure and a widely accepted rational for government remedial measures.

Our review of CTIA Consumer Code for Wireless Service, to which all the major carriers are signatories, appears quite responsive to consumer needs and in some respects exceeds requirements in the draft. The Committee might usefully compare its requirements with those in the CTIA Consumer Code. The purpose would be to identify ways in which implementation of the Code does not adequately serve consumers and could effectively be remedied by government action. The requirement that contract terms be spelled out in a "clear, plain and conspicuous manner" is on target and should leave little room for dispute.

Finally, we are happy to report the good news that the evolution of competition among rivals in wireless markets is now, and will continue to be, marked increasingly by quality of service improvements and service differentiation. Churn is a major cost and customer dissatisfaction is a major source of carrier switching. Thus, service rivalry among carriers will continue to increase and add value for consumers.

Third, we compliment the authors of the draft for their efforts a) to clarify consumer protection requirements and b) to nationalize their definition and enforcement. The national regulatory framework put in place in 1993 homogenized economic regulation of wireless carriers nationwide. By all indications, it has worked well and may be credited in substantial measure with performance gains in the sector. That jurisdictional framework should be replicated as needed to assure adequate consumer protection.

While there are legitimate state interests in protecting consumers, state regulation poses companion risks. The first is that well meaning consumer protection rules will morph into full scale rate and service regulation of the kind avoided since 1993. The second is that consumers will be burdened in the form of higher rates, less innovation and service differentiation, and less flexibility in adapting to the dynamic market environment as a result of regulatory delay and uncertainty. Third, it is unavoidable that the costs of individual state regulations will in part leak and burden users from other states. Since users are mobile and carriers are regional/national, state specific costs will in part be nationalized. The result will reduce carrier scale and scope economies in producing satisfactory national customer service.

Eventually consumers are burdened by all unintended and unanticipated costs of efforts to protect them. We have reviewed several economic studies of the costs and benefits of State versus Federal consumer protection and find no economic basis for

encouraging, or permitting, a mosaic of different state regulatory schemes. We also note that there is no basis for imposing more rigorous consumer protection standards and rules for wireless customers than for those in other economic sectors.

Fourth, we are very concerned with any prospect that regulatory bodies at any level might engage in any kind of rate, service or consumer protection regulation based on cost of service. The history of cost of service regulation in the wireline sector is filled with danger signs and few successes. Network costs are largely common and the varieties of methods for allocating them to individual customers border on the mystical and are costly in terms of time and resources. There is no credible evidence that regulatory costing in this sector would on balance create value for consumers.

Finally, we are uneasy about Title II which deals with government owned network competition with privately funded carriers. I have been for several years advising governments around the world on the benefits of privatizing government owned telecom networks and the dangers of taxpayer funded competition. Consumers are not served abroad, or here, by use of tax revenues to subsidize less efficient public networks.

I know well the arguments on both sides and hope the final version of the bill expresses a strong preference for private systems and contains language guarding against taxpayer subsidies to public networks that ultimately discourage investors from constructing the very capacity that is needed. In this regard recent reports of the difficulties faced by current local government-owned networks only magnify the importance for Congress to give the right signals to both governments and private investors.

Thank you again for inviting me and I look forward to your questions.

Mr. MARKEY. Your time has expired. And now we are going to recognize Chris Murray. Mr. Murray is a Senior Counsel at the Consumers Union, and he testifies today on behalf of Consumers Union, the Consumer Federation of America, Free Press and Public Knowledge. Welcome back, Mr. Murray.

STATEMENT OF CHRIS MURRAY, SENIOR COUNSEL, CONSUMERS UNION, WASHINGTON, D.C.

Mr. MURRAY. Good morning, Mr. Chairman. Good morning, Ranking Member Stearns and members of the Committee. I appreciate you having me back again. First, I would like to thank staff for the hard work on a really excellent draft bill. Producing serious legislation in these times is often difficult, and I would like to commend staff for doing a good job here. We think the bill is a good bill. We don't think it is a perfect bill. But I will tell you a little bit this morning about what we see in the marketplace, what we like about the bill, and what we might like to see in the bill that is missing. As I mentioned to the committee before, wireless consumers are not as satisfied with wireless services they should be.

Our magazine, Consumer Reports, does a survey of consumers every year, and we found that wireless is 18 out of the 20 industries that we survey, just above computer makers' tech support and cable television service, digital cable television service. And we would like to see those marks improve. We see that U.S. consumers are spending more on wireless than consumers in other countries, an average of about $506 per year, versus Sweden where they are spending $246 on average per year and Germany where they are spending $371. There is a lot of happy talk from the industry about permanent pricing, but permanent pricing doesn't have much relevance to consumers if you are not getting permanent prices. You can't get a plan from the wireless companies that has no flat fees in those 7 to 8 cents per minute fees that they are talking about, so it doesn't seem to me that it is a terrifically relevant measure of cost here.

It is what consumers pay on average in the end that matters. We see that this is a high fixed cost industry with the unlimited plans that a lot of the carriers are unveiling, so again we don't know that permanent pricing is really a good metric here. We see some of the services that carriers are offering are extraordinarily expensive. Skydeck's CEO was before this committee and noted that ring tones from the carriers note per note are the most expensive form of music in history at $2 per 15 second jingle. We see that text messages, if you were to put a floppy disk worth of text messages across the network on a permanent basis, it would cost you more than $2,000 to send that, and it is a very small amount of data.

Of course, there is a $20 plan that they would like to get you into and so again it is these high fixed costs that we see. Price aside, we are concerned with some of the competitive tactics that we see from the carriers, such as high early termination penalties even when consumers are getting those subsidies. We understand that there may be a justification for some of these early termination penalties if the subsidies are there, but it really is a head scratcher to me when a consumer buys a phone such as the iPhone. It has got no subsidy attached to it, yet they still get locked into that

$175, 2-year contract. We see handset locking and application blocking, where innovation isn't reaching consumers where entrepreneurs aren't able to break into the market because they can't sign a deal with the big carriers.

Blackberry, for instance, had an application that they want to offer consumers for free, a mapping program, but AT&T had one for $10 they wanted to offer consumers, so Blackberry's free application never saw the light of day. We see that U.S. consumers have fewer choices than European and Asian consumers in handset markets, because most of them are being sold through the carriers. So again we see some concerns in this marketplace, and we are glad to see a bill that is taking on the serious task of addressing those concerns. What we like about the bill is that it aims at clearer disclosure of the terms of cell phone service. It gives you better information on coverage maps, on call quality, and importantly, we think, aims for more transparency about these early termination penalty subsidies.

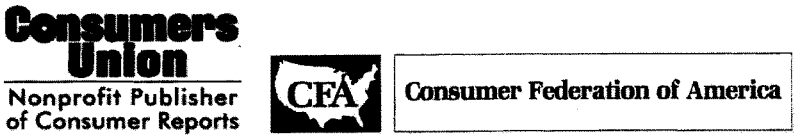
If the subsidies are there and consumers are benefiting from them, great, let us just see some more information about what those subsidies really are. Our fear, as I said, is that the carriers are padding those early termination penalties not to reflect actual costs or damages but that it is a little bit of overage. We like that the bill aims to eliminate junk fees. There is no more padding bottom lines with these mystery regulatory charges that aren't authorized by any state, Federal or local authority. And we like that the bill preserves municipal authority to provide broadband service in a competitively neutral way. The bill also aims at more efficient spectrum usage. That would pave the way for innovative new technologies like smart radio. We think that is extraordinarily important to begin that conversation for consumers.

What the bill needs, we think, perhaps most importantly is a strong provision against application blocking and handset locking. It is my hope that some forward-thinking member of this committee will make a stand for innovation and for independent entrepreneurs and do something to add a provision to the bill on handset locking and application blocking. We would also like to see it eliminate the FCC's common carrier exemption. One of our concerns if you are going to federalize wireless treatment, there may be Federal regulatory authorities that don't have full purview over this industry because all common carriers have an exemption from Federal Trade Commission oversight. So we think that it is important if we got the most important Federal body overseeing advertising practices that their hands not be tied if we federalize this.

So the central question of the bill is what is the price of preemption? Will consumers have strong protections and good remedies available when harms emerge, or will they find that with the states out of the game there is nobody to answer their calls at the Federal government or that the wireless industry, as I mentioned, getting special protection so that some of the agencies they would otherwise be able to turn to have their hands tied? Wireless services will increasingly become the way that citizens connect to the Internet and connect to the economy of the 21st Century. We think that free markets and competition help solve a lot of these problems, but only when consumers are armed with good information, reliable in-

formation, and then they are unconstrained to vote with their feet and vote with their pocketbooks. Thank you for having me.

[The prepared statement of Mr. Murray follows:]



Testimony of

Chris Murray
Senior Counsel
Consumers Union

On behalf of

Consumers Union, Consumer Federation of America, Free Press and Public Knowledge

Regarding

"A Discussion Draft on Wireless Consumer Protection and Community Broadband Empowerment"

Before the

U.S. House of Representatives Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce

On

February 27, 2008

Chairman Markey, Ranking Member Stearns, Vice Chairman Doyle and esteemed members of the Committee, thank you for the opportunity to testify again before you on behalf of Consumers Union[1] (non-profit publisher of Consumer Reports), the Consumer Federation of America,[2] Free Press,[3] and Public Knowledge.[4]

We would first commend the excellent work of the Telecommunications & Internet Subcommittee staff, who have here produced serious legislation that could both benefit consumers and stand a chance of passing in this Congress, with a bill that represents a sensible compromise between consumer and industry interests. The discussion draft aims at getting reliable information to consumers on wireless services—better information on hidden fees, coverage maps, and call quality. Better information means more efficient markets, more competition, and more innovation. We look forward to working further with staff to perfect the draft.

Today we will briefly survey cell phone company practices that concern consumers, and in that light provide our comments on this discussion draft—what we like, what we have questions about, and what we believe is missing.

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* (with approximately 4.5 million paid circulation) regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than 50 million individual members.

[3] Free Press is a national, nonpartisan organization working to reform the media. Through education, organizing and advocacy, we promote diverse and independent media ownership, strong public media, and universal access to communications.

[4] Public Knowledge is a Washington DC based public interest group working at the intersection of communications policy and intellectual property law. Public Knowledge seeks to ensure that all layers of our communications system are open and accessible.

Consumers are not as satisfied as they should be with the wireless industry as a whole. **In an annual consumer satisfaction survey[5] of 20 industries conducted by our magazine, Consumer Reports, "cell-phone service" ranks near the bottom of the list (18 of 20), with only "computer makers' tech support" and "digital cable TV service" receiving lower marks.**

U.S. consumers pay more for wireless service than consumers in just about any other country in the world. The wireless industry tries to deny this fact with a lot of irrelevant talk about prices per minute.[6] **But it's the cost to the consumer that matters, and U.S. consumers pay more—an average of $506 each year**, higher than the OECD[7] average of $439, and way above countries such as Sweden ($246), Spain ($293), and Germany ($371).

Early Termination Fees are ubiquitous in the wireless industry, with some carriers charging as much as $200 if a customer wants to leave before their (generally two-year) contract is completed. While Verizon has adopted a policy of partially pro-rating these fees, the other carriers have only made announcements—we are still waiting on follow through—and one even seemed to be actively misleading consumers, telling would-be subscribers that they already pro-rate plans when they absolutely do not yet do so.

Question: Why does a customer of the wireless companies who gets no subsidy on a phone still get stuck with a $175 early termination penalty?

We'll call this the "iPhone problem." Wireless carriers say consumers are getting huge subsidies, and as a result they're forced to charge consumers early termination penalties. But we see consumers who get no subsidies still being charged the full penalty, such as iPhone purchasers or

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[5] Consumer Reports, *"Upfront: News, Trends, Advice,"* p. 8 (October 2007).

[6] We love talking here in the U.S., so our average of 800 minutes of use each month indeed means lower per minute prices. Putting aside whether all that cell phone time is good for us, we see that all the carriers are rolling out unlimited plans at present. What might this tell us? That the wireless carriers have suddenly come down with a case of altruism? Or is it that this is a high fixed-cost industry, and per-minute pricing doesn't mean much anymore? It's what consumers pay in the end that hits them in the pocketbook. If the wireless carriers wanted to offer consumers rate plans with no flat fees and per minute billing at that "average" per minute rate of 7 or 8 cents, we would have a different outlook.

[7] Organization for Economic Co-operation and Development, "OECD Communications Outlook 2007."

customers who bring their own phones—and we don't see any accounting whatsoever about the real benefits consumers get. We're concerned that those benefits are lower than companies claim.

We say, "show us the money." If consumers are getting great subsidies, terrific, account for them, tell us what they are, and charge us fees that reasonably relate to those so-called subsidies.

In landline phone service, if a consumer moves to another state, he or she just cancels service and picks up a new provider in the new state. No lock-in to long term contracts, no early termination penalties when I move. Why all the anti-competitive lock in with wireless phone service?

Unconstrained early termination penalties are at direct odds with federal policy on number portability. Congress decided that number portability was good public policy, and it was right when it made that judgment. Consumers *should* be able to keep their numbers so that competition and innovation thrive.

For years, the wireless industry argued that consumers should not be able to keep their phone numbers, because nobody really *wanted* to keep their phone number anyway. After four or five delays, Congress and the FCC finally followed through, and number portability turned out to be a boon to competition and a benefit to innovation. We believe that eliminating or reducing early termination penalties to reflect actual costs will be similarly salutary.

Another problematic practice is when carriers extend contracts for any change in service plan—whether the change benefits the wireless carrier or not. In other words, if a wireless customer decides to increase his or her bucket of minutes, the carrier may automatically extend the contract for another year or two, and saddle the customer with another Early Termination Fee if he or she decides to leave before the contract is up.

Mobile phone "locking" is another area of concern for consumers. In Europe, phones work seamlessly between networks and carriers do not exercise control over which phones subscribers can use. This has created a robust, independent market for mobile phones where users

have far greater choice than U.S. subscribers. In the U.S., analysts estimate that 90 to 95% of handsets are sold by the wireless carriers, whereas in some Asian markets approximately 80% are sold independently from the carrier.[8]

There are two basic kinds of mobile phone locking:[9] software locks (which actually disable the phone when the user leaves), and "approved phones only" policies (which do not allow users to activate phones they purchase through the network operator, even when independent phones are technologically compatible with the network).

Imagine that a consumer purchased an expensive new television set and decided to switch cable or satellite providers, but the provider said "I'm sorry, your new TV will not work on our cable system, you'll have to purchase a new one—from us." Policymakers would not tolerate this behavior for long, yet this practice has been pervasive in the wireless industry for several years now. We would like to see the House draft mirror the provisions in the Senate bill that the FCC study this issue of mobile phone locking.

Application and functionality blocking is another practice that costs consumers money, and denies our economy the dynamic benefits of innovation. As a Wall Street Journal article[10] noted, handset manufacturers have been trying to offer consumers services for free on new handsets, but network operators have said "no" to those free services because they compete with services that the wireless carriers want to charge for.

According to the article, RIM (manufacturer of the Blackberry) wanted to offer a free mapping service to customers who buy the Blackberry, but AT&T refused, because they had a service that they wanted to charge users $10 a month for.

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[8] Marguerite Reardon, *"Will 'unlocked cell phones' free consumers?"* CNET News.com, January 24, 2007, available at: http://news.com.com/Will+unlocked+cell+phones+free+consumers/2100-1039_3-6152735.html?tag=st.prev.

[9] For more information on mobile phone locking, see Professor Wu's paper, *"Wireless Net Neutrality: Cellular Carterfone and Consumer Choice in Mobile Broadband."* New America Foundation Working Paper #17, Wireless Future Program (February 17, 2007).

[10] Jessica Vascellaro, *"Air War: A Fight Over What You Can Do on a Cell Phone – Handset Makers Push Free Features for Which the Carriers Want to Charge."* Wall Street Journal (June 14, 2007).

Yet another instance of troubling conduct is the slow rollout of mobile phones that do Wi-Fi—these phones allow consumers to use the Internet when they are near a Wi-Fi Internet "Hotspot." Most U.S. carriers are not making these phones available to consumers, although T-Mobile is currently offering these handsets. But as the Chairman of the FCC noted in a USA Today article,[11] "[i]nternationally, Wi-Fi handsets have been available for some time, . . . but they are just beginning to roll out here.. . . I am concerned that we are seeing some innovations being rolled out more slowly here than we are in other parts of the world."

Indeed, in Europe and Asia, wireless consumers have better choices. We can buy cell phones in London, and simply swap out a small card (called a SIM card) in the back of the phone and it works across any other European network. This decoupling of networks and handsets has created a vibrant European handset market, where manufacturers innovate relentlessly to keep customers loyal. In stark contrast, the U.S. handset market lags European and Asian markets, precisely because wireless operators have the power to dictate which phones will interoperate with their networks, keeping out the competition.

We are pleased to see that some carriers with problematic practices are turning towards openness. We hope that those promises will see follow through, and we commit to working with the carriers to make it so.

In sum, we are concerned that the wireless industry has become a cozy cartel of a few dominant providers characterized by consumer lock-in and limited device offerings. Instead of engaging robust competition, these carriers are charging consumers unconscionable Early Termination Fees and thwarting real choices in the marketplace. Action from policymakers is sorely needed.

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[11] Cauley, Leslie. *"New Rules Could Rock Wireless World: Consumers, not carriers, may get to choose devices."* USA Today, (July 10, 2007).

Comments on the discussion draft

Allow me to note the provisions of the bill we believe will benefit consumers, pose some questions we have, and suggest ways the bill might be improved.

First, the bill requires clear disclosure of the terms and conditions of mobile phone service. Efficient markets are predicated on consumers having reliable information about the services they buy. The discussion draft would provide better coverage maps, better information on dropped calls and call quality, and better information on "subsidies" that consumers receive.

We're enthusiastic about section 101 (a)(1)(d), which requires that consumers be given notice about the terms of any subsidies they receive. We think the bill could go farther by requiring wireless companies to account for the *actual* subsidy each consumer is receiving. In an ideal world, companies would show consumers exactly what they're getting in return for getting locked into a two-year deal with a $175 early termination penalty. We're suspicious that consumers may not be getting as much as the wireless phone companies claim in return for getting locked in, because consumers who buy phones with no subsidy (such as the iPhone) are getting charged exactly the same penalty. No subsidy, full penalty—something doesn't compute.

Second, the bill aims to eliminate junk fees on mobile phone bills, which we applaud. Many providers charge an unspecified "regulatory fee" that allows them to advertise lower prices and then pad the bill at the end of the month with these mystery charges. This bill would sensibly require that any so-called "regulatory fee" be explicitly authorized by a federal, state or municipal authority.

Third, the discussion draft gives consumers a penalty-free trial period and disallows contract extensions without explicit subscriber notice, which we support. Our survey data showed that contract extensions and the associated early termination fees were among consumers' biggest annoyances. The problem here is that some wireless companies were extending consumers' contracts by 2 years for every change they made in a rate plan. Let's say a consumer decided to give the cell phone company more money each month and increase the number of minutes in their plan.

Even though this change in plan benefitted the carrier, some carriers would extend the contract for another two years, just because they can. We're glad to see that many of the carriers have ended this practice, and this section of the bill cleans up the marketplace for those remaining holdouts.

Fourth, we appreciate that this bill acts to preserve municipal authority to provide broadband service to citizens. The network providers can't have it both ways. On one hand they don't want to be forced to provide service anywhere they don't see an economic case for it—so they squashed anti-redlining legislation. On the other they have sought special treatment to protect themselves from competition, passing legislation in some states that ties the hands of municipalities who are fed up waiting for network operators to provide service to *all* their residents, rather than seeing network operators cherry pick the wealthiest, most convenient to serve ones.

The provisions of this bill that preserve competitive options for municipalities are well drafted, requiring that municipalities providing broadband do so in a competitively neutral manner. It also requires notice to and input from the community on the costs and benefits to municipal broadband projects. This is a balanced approach that we think any reasonable operator would find difficult to quibble with.

We support the provisions of the draft in Title III which require the FCC to work harder to use radio spectrum as efficiently as possible, paving the way for innovative new technologies like smart radio that promise enormous consumer benefit.

Perhaps our central question as the discussion draft moves forward is if we federalize the regulatory model of wireless, is it a floor or a ceiling, and does it come with unintended consequences? Before we scale back state authority to help tackle the next generation of problems that consumers may face, we need to consider the full effects of doing so. A few years ago, nobody ever heard of long term contracts, and consumers could get a simple cell phone plan for $20-30. Today the entry price is 25-50% higher than that, and discounts only come after consumers are locked into a bunch of conditions they don't necessarily understand.

What might be the unintended consequences of preemption? The law as it stands today says liquidated damages clauses have to be related to actual costs. There are active complaints in several states alleging that these companies are breaking the law by charging early termination penalties that have little or no relation to actual costs. If by imposing constraints and conditions on early termination penalties we are tacitly justifying them when they were otherwise illegal, this may be a net negative for consumers. Our fear is that this draft will become watered down and laden with provisions that actually harm consumers.

We're seeing more advertising on mobile phones, and while we're not predicting anyone will be scammed, history instructs us to at least consider who will defend consumers if problematic practices emerge. Do we want greater power in the hands of an already overworked, underperforming Federal Communications Commission? Or do the states have a useful role in investigating new kinds of fraudulent and deceptive practices?

This question is especially salient considering the wireless industry's exemption from Federal Trade Commission (FTC) oversight. The FTC is the federal front line investigating and prosecuting unfair and deceptive advertising practices. Why should the wireless carriers benefit from less state oversight when they're not subject to the full range of federal scrutiny? **We believe that before Congress can consider scaling back state authority, it should consider eliminating the FTC's common carrier exemption.**

What's missing from the bill? As we mentioned above, we believe that **the draft needs to address the cell phone locking and application blocking problems** referenced above. Even a provision as light-handed as Senator Klobuchar's cell phone locking study would be better than not addressing this problem at all.

The FCC tacitly acknowledged that the next generation wireless Internet should be every bit as open as today's Internet when it applied openness conditions in the C block of the 700 MHz auction. We applaud the agency for its leadership in that instance—but what about the 250 million

mobile phone subscribers in the U.S. today? If this is enough of a problem to warrant action in a forward looking way on new spectrum, surely the agency should do something to act on abuses with the quarter of a billon mobile phone subscribers in the U.S. today.

Wireless Internet services will increasingly become the way that consumers connect to the Internet. If we allow anti-consumer, anti-innovation practices to continue—such as unjustified early termination penalties, application blocking and handset locking—we should expect our international broadband rankings to continue to slide, innovation to be less robust, and our mobile phone markets to continue to lag behind Europe and Asia.

Free markets and competition can help solve many of the problems noted above, but only when consumers are armed with reliable information about the services we buy and when we don't encounter undue obstacles to voting with our feet and pocketbooks.

Mr. Chairman, I'm grateful for the opportunity to testify before your Subcommittee today. Thank you.

Mr. MARKEY. Thank you, Mr. Murray, very much. The chair will now recognize himself for a round of questions, and let me begin by asking you, Mr. Largent, the wireless industry stipulates that the early termination fee reflects in part the cost of a subsidized phone. Two questions. One, do you support telling consumers the amount of the subsidy they are getting?

Mr. LARGENT. Yes.

Mr. MARKEY. And, 2, if a consumer brings their own phone and thus it is not subsidized with the service, should their early termination fee be the same as for a consumer whose phone is subsidized?

Mr. LARGENT. No, and I would like to explain why. Because the subsidization goes far beyond just the phone that you purchase. The subsidy, you talk about the cost for acquiring customers, the cost to service a customer, that all is part of the subsidy. It is not just the subsidy for the phone.

Mr. MARKEY. Mr. Murray, your comments.

Mr. MURRAY. There is the cost of doing business for every other business in America. You know, on your cereal box there are certainly other costs besides just producing the cereal. There are regulatory fees associated with that. But they bundle it all in, and they give you an all-in price at the end.

Mr. MARKEY. So should they deduct the amount of the subsidized phone?

Mr. MURRAY. I am not sure I understand the question.

Mr. MARKEY. In terms of the charge to a consumer who is not——

Mr. MURRAY. At minimum I think they should deduct the charge of the subsidized phone, but it also seems to me that if you are not getting the main bulk of the subsidy, maybe there are other subsidies in there, but I think most carriers would concede that the claim at least is that the phone is the bulk of the subsidy so removing the bulk of that subsidy what is left, and shouldn't consumers actually get a lower price on not just eliminating the early termination fee but on their monthly price of service, because if the recovery of the subsidy cost is built into the cost of the service and you are not recovering a subsidy, it seems to me there should be some consumer benefit pass through there.

Mr. MARKEY. OK, great. Now again, Mr. Largent, what the draft bill seeks to do is to establish national consumer protection rules, yet while the bill seeks to preempt states from establishing differing standards, it authorizes states to enforce the national standards in addition to the Federal Communications Commission. Now many wireless carriers seem to oppose state enforcement. If we establish a single set of rules, what is wrong with a state cop on the beat to ensure effective enforcement?

Mr. LARGENT. Well, the fear is that the rules change. When you have somebody enforcing a rule that maybe the way they interpret the rule changes in every state, and that is the fear.

Mr. MARKEY. But you don't want all complaints going to the Federal Communications Commission, do you? It is an understaffed agency to begin with.

Mr. LARGENT. I think there is a role for the states to play. It is just defining what that is I think is the real nut that we have to

crack here, but I think that the interpretation of the rules is the thing that we hear the most is that every state begins to——

Mr. MARKEY. So in theory you are not opposed to state enforcement?

Mr. LARGENT. No.

Mr. MARKEY. OK. Mr. Murray, can you comment on state enforcement?

Mr. MURRAY. Well, I think you raise a good point, which is that we don't want to be putting more work on an already overworked and under-performing Federal Communications Commission. I think that the states have an important role in enforcing these standards.

Mr. MARKEY. Mr. Durel, a group of associations representing the local exchange carriers recently sent the subcommittee a letter saying that municipal broadband legislation would chill investment by private providers and that any municipal broadband network should be confined to areas where there are no private providers. Do you have a response to those arguments?

Mr. DUREL. Well, I would think that our number 1 goal is not to chill the investment but to service the consumers, and if they are not servicing the consumers then I think it is pretty logical for the municipalities to step up.

Mr. MARKEY. So you are saying if they are there they are not providing the level of service.

Mr. DUREL. Again, we had the great story of 1896. We have—I think the APAA, I think initially there was about 3,500 or so communities that decided to bring electricity themselves because the private sector wouldn't do it. And in our town it took about 25 or 30 years for the private sector to show up with electricity. We can't wait for it to be convenient to them.

Mr. MARKEY. So you are saying the companies might be there to provide you kind of dirt road service in terms of capacity, and you want to be able to bring in a super highway, because that is the only way you are able to remain competitive with the job creation.

Mr. DUREL. That is exactly right. We have what you have here in Washington already. We are not saying that we don't have broadband service, but we don't see where we are getting that super highway to prepare ourselves for the future, and this new technology, and it is not that new, but it is more proven, but we see this as the infrastructure of the 21st Century. And once again if we don't do it, we are not going to get it.

Mr. MARKEY. Thank you. My time has expired. The chair recognizes the gentleman from Florida.

Mr. STEARNS. Thank you, Mr. Chairman. Mr. Durel, you had mentioned in your opening statement about how you are providing fiber optics to the home at 100 megabits. That is pretty impressive. But I think you said in your statement that you provide it for free to the consumers?

Mr. DUREL. I was trying to get a lot into 5 minutes, but that is not quite right.

Mr. STEARNS. I think the question I have is what are you charging the consumers, and moreover, you are subsidizing this effort of laying down the fiber optics and doing it through your electric company or how are you paying for this?

Mr. DUREL. Ratepayers. This is not taxpayer dollars. It is no risk to the community. It is like a private business, and we went to Wall Street, borrowed money based on the model that we had, bought insurance to cover any risk at all, and it is strictly paid by the ratepayers. And what we are going to charge our community for the 3 services is probably going to be—we have guaranteed 20 percent less than whatever they are getting already for more quality, so for $85 they will get telephone, television, and Internet as compared to about $110 in Lafayette right now.

Mr. STEARNS. So you put that out in consumer information saying we will undercut any private company by 20 percent?

Mr. DUREL. We say we can provide it for 20 percent less, and we hope it will come down.

Mr. STEARNS. But there was no one out there to really challenge you, right?

Mr. DUREL. Sure. There are private companies out there that can challenge us.

Mr. STEARNS. OK.

Mr. DUREL. And they did.

Mr. STEARNS. So now are you the sole provider?

Mr. DUREL. No, no. We have AT&T and Cox Communications.

Mr. STEARNS. Now you understand that when you go to Wall Street you are getting a better deal than if I went to Wall Street or the average company goes to Wall Street because you are getting municipal bonds discounted.

Mr. DUREL. And they get tax benefits we will never get. They get tremendous tax benefits that we don't get.

Mr. STEARNS. So you think the tax benefits to the private sector offsets the advantage, since you don't have to pay any taxes?

Mr. DUREL. Well, we do pay taxes. It is just called in lieu of taxes, and we pay a lot more in Lafayette than they pay in Lafayette.

Mr. STEARNS. And what is in lieu of taxes, who does that go to?

Mr. DUREL. Because we are a publicly-owned utility, officially we can't pay taxes, so it something called in lieu of taxes, and we also in the negotiations that we did with our legislature is we have to price ourselves as if we are paying the same taxes that we are paying, which we offer to do because they pay so little in our state.

Mr. STEARNS. Mr. Darby, do you have any comments relative to what Mr. Durel said?

Mr. DARBY. The Committee faces a dilemma here, and our view is that we want consumers to have service. We want them then to have good service, and we want them to have a choice of service. And I will put on my former Wall Street hat for a minute and express the concern that as a practical matter any state or local government involvement in this sector signals to the private sector a competitive advantage in the form of lower cost to capital. Now I don't know the particular circumstances here. We would support if circumstances show that nobody else is going to be willing to offer the service that it doesn't make any sense to deny consumers that service.

That said, we think the playing field ought to be level. We think that any government-affiliated or -owned provider should provide those services on a competitive basis and pay the same kinds of

cost, the same kinds of taxes that the private folks would. The real problem here is that once you put in place a government-operated system, it is going to be difficult to justify to Wall Street why you should put in another one.

Mr. STEARNS. Mr. Largent, assuming this bill goes forward and in effect if the state attorney general or Public Utility Commission could adopt additional enforcement protections or punitive remedies in addition to what the FCC Communications Act provided, how do you feel about that?

Mr. LARGENT. Well, as I mentioned to Mr. Markey, he talked about a role that the states can play, and we think that there is a role that the states can play to. We think the role that they play is best played through the state attorney general, who has a consumer protection responsibility, and so when I said that, that is what I was referring to. We would prefer not to see the PUCs and the state legislatures involved in trying to legislate or regulate the industry, and that is why we are here today to have a national framework for the other terms and conditions that don't operate under a national framework today.

Mr. STEARNS. My last question is that I think all of us have sons or daughters who complain about they have lost their cell phone or they want to cancel and get the newest and greatest, and then they get all these early termination fees, so they all come to us and complain and want us to pay for them. But I guess the question for you is has the industry responded to these consumers' complaints by full information to them at the front get-go so that they know, because I always say to my son, well, did you read the fine print? Do you think that your industry could perhaps be a little bit more transparent and explain this more carefully to them so it is not a feeling that they have been taken advantage of?

Mr. LARGENT. Well, I am not going to make any excuses for any person working in the shopping mall that doesn't do a good job of explaining early termination fees to a customer. We certainly have those cases involved in our industry, and we try not to do that. That is not a standard practice or standard operating procedure. But in our consumer code we talk about being very forthright with the terms and conditions and early termination fees and the like when we sell customers a cell phone. But the fact is that our companies actually are moving to address early termination fees as we speak.

Even as I was speaking at a NARUC meeting right here in D.C. 2 weeks ago in the process of—from the time I started my speech to the time I ended my speech another company actually addressed early termination fees and their reduction of early termination fees over the course of a contract. And so we are seeing movement already in response to consumer demand as our industry always does.

Mr. STEARNS. Thank you, Mr. Chairman.

Mr. DOYLE [presiding]. I thank the gentleman. So I am taking a look at this 700 megahertz result, and in particular the C block has met its reserve, and it looks like it is going to sell for around $5 billion. The likely winner, Verizon Wireless, has announced plans to hold a developer's conference that allows third parties to create devices and applications. And AT&T says that they are already

open. They are going to let you take your own device and use whatever application they want. Mr. Largent, are you as excited as I am about that?

Mr. LARGENT. I really am. I think that some of the remarks that Mr. Murray made are going to be addressed through this open access piece that is being auctioned today. Of course we have to be careful what we say about an auction that is ongoing today, but having open access and having it applied to the wireless industry, I think is going to be a tremendous innovation for our industry, and it is going to continue to grow and continue to get better and better. And so I am very positive about the open access piece, and I think you are going to see a lot of players. As you mentioned, there are a number of companies, national companies in the wireless industry, that are already moving in that direction.

Mr. DOYLE. What do you think about that applying to all carriers, not just Verizon and AT&T?

Mr. LARGENT. That would move to open access?

Mr. DOYLE. Yeah.

Mr. LARGENT. Well, not all the carriers are going to have access to 700 megahertz, and that particular piece of spectrum is particularly appropriate for accessing the Internet. But I think we are a competitive industry. You are going to have a number of companies move into this open access world, particularly the major wireless carriers, so I think the competitive forces are going to work to see that you will have more of our members a part of the open access alliance than not a part of that open access alliance.

Mr. DOYLE. Mr. Murray, are you excited about that, too?

Mr. MURRAY. Sir, I am excited about the possibility that consumers will see some more openness. I am a little worried that perhaps the promises aren't quite going to match up with the reality. I know that initially Verizon was suing over the open access conditions. They withdrew that. CTIA is now the plaintiff in that suit, so again it seems like this is going to be challenged in some regard. You know, I would like to see these companies move towards openness, and we are going to work in earnest with them to try to make it so for consumers. But we have seen promises made that haven't been promises kept. We saw carriers saying we are going to reduce early termination penalties, and they haven't quite gotten those reductions in place yet.

They announced it a day before a Senate hearing, and what we found is that they were actually telling consumers that they were reducing early termination penalties when in fact they were not, and this is not people in a mall, this is customer service representatives on a company's main call lines. So, you know, again we want to make sure promises comport with reality.

Mr. DOYLE. And I am curious about that, Mr. Largent. If two of your largest members, Verizon and AT&T, are moving towards open access, why is CTIA still suing the FCC to block that?

Mr. LARGENT. Well, we are suing because of a statement that was put in the record about open access that claimed that there was a limited supply of handsets available to customers in the United States. That was something that was said as a part of the 700 megahertz auction, and we wanted to say—our protest didn't have anything to do with the open access piece. It has to do with

the statement that was made in this filing by the FCC that said that customers in the United States did not have access to many handsets, and the facts are that customers in this country have access to over 600 different handsets. We think that is a lot, and so we felt like we needed to file this suit just simply to correct the statement that was made by the FCC.

Mr. DOYLE. I see. Mr. Murray, do you have any final comments about that?

Mr. MURRAY. It seems like a bit of a big hammer to go after a misstatement in the record, but in any case I believe that we are going to see companies move towards openness over time because the market will eventually demand it, but in the meantime we still see carriers out there who I can't bring my own phone to Verizon, I can't take AT&T's iPhone to another network without breaking my agreement with the company, so we are concerned about the practices that we see.

Mr. DOYLE. OK. Thank you very much. The chair is going to now recognize my good friend Mr. Shimkus for 8 minutes.

Mr. SHIMKUS. Mr. Chairman, I would like to because Mr. Upton has to leave, I would like to allow him to jump ahead of me if that is OK.

Mr. DOYLE. OK, no problem. The chair recognizes Mr. Upton for only 5 minutes.

Mr. UPTON. I appreciate my friend, Mr. Shimkus, letting me go next. I do have a couple questions. I appreciate your testimony, and I guess I want to go back to something that Mr. Murray said and just clarify it with you, Steve, and welcome back to the subcommittee. Is your sense with the new auction block that is there that in fact will get directly to the argument that Mr. Murray raised that we will have more services and less cost, the example that Mr. Murray used that Sweden is twice as expensive as ours in offers, and we offer fewer services will be resolved?

Mr. LARGENT. Well, actually I think it is resolved today, because the fact of the matter is we have more services at less cost than any other country, particularly in Europe. If we do this price per minute, the U.S. is about 5 cents per minute, 4 or 5 cents per minute. Sweden is 12 cents per minute. Spain is 16 cents per minute. Germany is 30 cents per minute. So clearly, and you look at the number of handset choices that customers in the U.S. have versus, for example, just take for example Great Britain. Customers in Great Britain have about 160 choices of handsets. In the U.S. we have 600 to 700 choices, so clearly the market is working in the U.S. better than anywhere else in the world in my opinion.

Mr. UPTON. Let me follow up with you as well as it relates to the consumer code that is there. Now most carriers—certainly I think the companies involved in CTIA——

Mr. LARGENT. If you are a member of CTIA you have to adhere to the consumer code, which represents about over 95 percent of the customers in the U.S. today.

Mr. UPTON. And I too, as you indicated in your opening statement, you are delighted that this bill has been introduced. We need to move forward. There needs to be some corrections. Does the consumer code allow for many of the changes that part of this bill has introduced?

Mr. LARGENT. This is actually a copy of our consumer code I brought with me, and it has 10 provisions in it. One is a disclosure of rates and terms of service to consumers, make available maps showing where service is generally available, provide contract terms to customers, and confirm changes in service, allow a trial period for new service, provide specific disclosures in advertising, separately identify carrier charges from taxes on billing statements, provide customers the right to terminate service on changes to contract terms, provide ready access to customer service, promptly respond to consumer inquiries and complaints received from government agencies, abide by policies for protection of customer privacy.

These are all things that we think go beyond what the bill requires. These are things that are adhered to by our carriers today.

Mr. UPTON. Mr. Durel, as I indicated, I am a supporter of allowing municipalities to participate. To me it allows more choice and competition. Obviously, you subscribe, I think, to many of the same consumer codes that Mr. Largent just indicated, is that right? Do you have a consumer code that is fairly recognizable by the consumers there in Louisiana?

Mr. DUREL. I really can't——

Mr. UPTON. Do they know their rights?

Mr. DUREL. Sure. We talked about, I heard level playing field a couple of times, and I always got a kick out of that, because it will never be a level playing field. Both sides have advantages. In our case we debated and discussed our project with our competition sitting out in the audience. Nobody in the private sector would ever do anything that dumb. But we did because we believe in transparency, and it has to be transparent, and so I think the consumers, they can call the CEO of this company, which is me, and they can call the board of directors, which is the council, and they can come see them every Tuesday night, so we have plenty.

Mr. UPTON. Now my sense is that you probably for the competition that is there, you said AT&T, and there was one other cable——

Mr. DUREL. Cox.

Mr. UPTON. Cox. Do they offer these bundled services, broadband, telephone, and video? What type of franchise fee do they pay to the City of Lafayette? What is your agreement with them in terms of—do they pay per subscriber?

Mr. DUREL. We get a little bit from them. And, by the way, since you said Lafayette, I said a while ago we had 125 people. We have 125,000 people in the city, and Newcom brought 1,000 jobs, not 100 jobs. But, yeah, we get a little bit. They help support our channel, the government channel, and they pay some attachment fees. Cox does. BellSouth doesn't pay anything, or AT&T.

Mr. UPTON. Thank you. Thank you, Mr. Chairman. Thank you, Mr. Shimkus, as well.

Mr. DOYLE. Thank the gentleman. The chair now recognizes my good friend from California, Ms. Harman.

Ms. HARMAN. Thank you, Mr. Chairman. In my opening remarks, I talked about enforcement, and my impression that the states, at least my state, are doing very well in the enforcement area. It also occurs to me that whatever we do about preemption, we don't want

to lose the ability for tough enforcement. So let me start with Mr. Murray and ask you about the role that state PUCs or other regulatory bodies and states' attorneys general are playing in the enforcement area, and whether you think this is a role that we would want to continue, and then ask others to comment.

Mr. MURRAY. You have put your finger on a really important point, which is that most of the marketplace changes that we have seen to date have been driven by either lawsuits or states' attorneys general in states pursuing the wireless carriers, whether it was for inaccurate coverage maps, inaccurate disclosure on billing, and so it would be an unfortunate, unintended consequence if what happened here was in the process of trying to set federalized consumer protection standards for consumers, we end up preempting a bunch of suits that are either on the eve of trial or states who are ready to get in the game on simply just enforcing the standards that we have got out there already. I don't think the regulatory creep fear is a legitimate one if we got strong Federal standards.

Ms. HARMAN. Let me ask others to comment. Anybody?

Mr. LARGENT. Well, I would just say that the states' attorneys general, they already have responsibility for consumer protection, and we don't have a problem with them being included in this bill in that fashion. We get more concerned when it goes to other agencies or other departments in a state, and we want to have a long talk about that.

Ms. HARMAN. Well, I appreciate that answer. I think we should have a long talk, but I don't think we want to cut states out of the consumer protection business, and I think that is what you just said, Steve, am I right?

Mr. LARGENT. That is right, and as long as we are operating through—I mean we feel like the safest way to do that is through a state's attorney general.

Ms. HARMAN. Well, let us talk then, as long as we are talking about consumer protection, about the future, and let me direct this question to you. What if new problems emerge, things we haven't thought of in this brilliant piece of legislation that we will eventually reach consensus on, new problems in the wireless market. For example, in the future cell phones become vehicles for identity theft, and they are already vehicles, but they become bigger vehicles, better vehicles, and there is text message spamming, which degrades service quality. Would you feel that the states would be free to act on new issues that aren't covered by our legislation? Let me ask all of you, how would you feel about that?

Mr. LARGENT. Well, I would say that the companies themselves are doing a great job of addressing many of these issues that you have already raised, and I mentioned that in my opening statement that we are addressing those. So my feeling is this is a competitive marketplace, and there are going to be problems that we are going to face in the future. And I would tell you that there are problems that we faced in the past, and the way that we have dealt with them is the most expeditious way to do it, and that is why the company is taking steps to ensure that their customers are receiving the type of services that they expect.

Ms. HARMAN. Well, I applaud the fact that the companies are taking steps, but we are all here today to see whether or not that

is adequate, and some of the examples we all gave show that there is a lot of consumer frustration out there. So let me ask Mr. Murray, what if new issues arise in this general area, do you think we should preempt the states from regulating regardless of whether the companies are doing more, which of course we would expect?

Mr. MURRAY. Well, surely the answer to what should we do in a forward looking way to protect consumers about novel issues that arise cannot be that the wireless industry association has a voluntary code of conduct that we should wave a hand and sort of say that consumers will be fine. Remember that code of conduct was created in response to California coming up with a telecommunications user's bill of rights, and I may be reading motive here which is not entirely fair, but in response to that the industry association came up with this voluntary code. I think it is a very good thing that they did this. We support that effort. We would like to work with them to tighten it up.

But what is the enforcement? Are they going to kick a member out who is a dues paying member who is one of their largest dues paying members? That is a hard thing to imagine.

Mr. DARBY. I might just quickly address both those questions, Ms. Harman. We support Federal standards. We support enforcement of Federal standards, and if the industry code of ethics, code of conduct doesn't work, we support having in some measure that enforced at the state level. Our concern is for what I call regulatory creep or mission creep. As a part of the FCC I have seen it. I have seen it happen. It happens at the Federal level. It is a natural sort of tendency to expand one's regulatory domain. It doesn't make these bad people. They are quite capable, and we will support targeted enforcement constrained, not to be expanded into unintended areas by clear cut national guidelines.

Ms. HARMAN. Thank you, Mr. Chairman.

Mr. MARKEY. The gentlelady's time has expired. The chair recognizes the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. A couple points. It is good to have the panel here, and I represent 30 counties in southern Illinois, approximately from Springfield, which is about 100,000 folks, all the way down to Paducah, Kentucky, and the Indiana border and the Missouri border, so it is a wide rural area. I have worked on the cell issues for a long time, not just basic communications so the consumer can have a great gadget, but on the emergency services side. So this is an interesting debate from the perspective of competition and choices for rural consumers and cost, because we are going to talk about universal service funds some day and moving to cell tower buildout, being able to do intersection abilities to be able to do identification location on it, and emergency issues.

And I always like just to highlight—I hate it when we compare the United States to my friends in Western Europe, because there is really no comparison on size. I took about 30 members of different NATO countries out to McCord Air Force Base, a 5-hour flight, looking down at the frost covered plains, and I talked to one of my colleagues, and I said this really gives you an idea how big a country this is. He goes you guys don't live in a country, you live in a continent. So it is easy to provide cell coverage to my friends

in Denmark. It is very difficult to do that in Creal Springs, Illinois, so in this whole debate about moving from Federal regulatory—I mean to a state regulatory framework to a national. And you can answer this if you want, but Steve, if you would start, and then we will just go on to Mr. Darby and Mr. Murray, do you think this will give us a greater ability to be able to have my consumers in parts of 30 counties of rural America more choices?

Mr. LARGENT. Absolutely. And this industry is moving as quickly as they can to make that happen. I would cite the fact that we have built 100,000 towers in the last 10 years in this country, and we continue to build as quickly as possible. We are spending as an industry $20 billion a year for infrastructure buildout in this country, and it is a big country, as you mentioned. And, you know, I flinch when I talk to a member that is from a rural district like yours is, John, because our coverage is not as great as it could be and it will be. And it is not from a lack of effort, because we are making the effort, and it is just a matter of time. And I think things like the 700 megahertz auction are going to go a long way to help us to improve our service in rural districts like yours.

Mr. SHIMKUS. Mr. Darby.

Mr. DARBY. I would really like to address that with just a quick story about how national networks get built, and the evidence is very clear from wireline networks, and the wireless sector is following it precisely. You start out by building the densest areas and the broadest pipes between the largest concentrations. The companies generate cash flow. They have people, very expert people, who ask themselves as capital budgeters the following question: where do I do better? Do I do better by extending into rural areas? Do I do better by building more cell towers, so I have fewer dropped calls in rural areas, or do I migrate from this generation to the next generation? And as a practical matter these businesses make those decisions. And over time, and it is clear it is happening in the wireless sector, over time these areas will be built out.

Now you ask me how fast they are going to be built out. I don't know, because the companies are feeling pressure if you lose that cash in a variety of ways because there is not enough cash to do them all. That said, if you look at the lesson of the wireline sector, it took, what, it took us something like 60 years to get up to 95 percent penetration. OK. Look at how fast we have gotten penetration in the wireless sector, and I suggest to you that competition is going to develop sort of much along those same accelerated lines to serve areas like yours and my hometown in Indiana.

Mr. SHIMKUS. Thank you. Mr. Murray.

Mr. MURRAY. I think that is exactly why a blend of solutions is important, and that is why the municipal broadband solution is important. We see a lot of rural members who are fed up with waiting for private enterprise to see that area and become profitable enough. It may be profitable, but they can't get quite the return that they would like, so we see municipalities that are taking charge and saying, look, we are fed up with waiting. We are going to provide this service to our citizens because it is not a luxury good. We are talking about basic communications, and that is why I think the provisions of the bill——

Mr. SHIMKUS. And I agree, and I am supportive. My concern is just the market, because once government takes control then do you lose the next generation of excitement? But I think that is something we are going to be able to work out and be supportive of. The terminology used in some of the draft language that states can adopt requirements consistent with Federal regulations, do we see that as a problem? Does that revolcanize the process, Steve?

Mr. LARGENT. I think it does, Congressman. It creates an unknown that I think will be resolved in courts as opposed to being resolved in Congress. I think Congress always wants to put their imprint on legislation and not allow it to go to the courts as the '96 Act eventually happened with it. So I think the more specific we can be about the roles that states will play and the more specific we can be about the roles that the Federal government is going to play the better.

Mr. SHIMKUS. Anyone disagree?

Mr. DARBY. No, I agree with that, and I have lots of friends who are lawyers who would regard that as a substantial contribution to their retirement to be able to debate in Federal court what is meant by consistent with the Federal guidelines.

Mr. MURRAY. It can necessarily be the case that Congress's judgment is far seeing enough to see all the problems that might come down the pike. What happens when we have got, let us say, a small group of rural consumers who are affected in a particular way? Maybe there is not quite enough impetus for a big national kind of action, but the state is able to focus on that problem, and again I think consistent with gets out a solution to the problem of 50 different models.

Mr. SHIMKUS. And I think we as legislators understand why some things aren't transparent and other things are. It is amazing what we want to make transparent and what we want to keep from being transparent. So let me just talk about the transparency issue on what occurs at the multiple levels of government, and if we are going to be transparent on fees and charges, wouldn't transparency on taxes and the like be just as important for the consumer?

Mr. LARGENT. I think it absolutely is important for the consumer to know exactly how much of his bill is going to taxes and fees versus how much is going for his actual service that he is paying for, and that is part of our consumer code that we ask our carriers—we demand that our carriers put that on their bill so that their customers can know how much they are paying.

Mr. SHIMKUS. Anybody else? An indication, Mr. Murray, you would concur?

Mr. MURRAY. I would concur with that. I think transparency is important. We have seen this in two sides. We have seen the different rates of taxation, which I think transparency there is good, and we have also seen it with these regulatory fees that sometimes you see these junk fees added to the bill where they call it a regulatory charge, but it is not quite a regulatory charge. It is more like bill padding.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Texas, Mr. Gonzalez.

Mr. GONZALEZ. Thank you very much, Mr. Chairman. And I am going to focus my attention on Title II, which is municipal broadband buildout so most of my questions will to go the mayor, and welcome, Mayor, and thank you for everything that you do in public service. You probably have the hardest job of any elected official. I know that Mr. Boucher and Mr. Upton have introduced a bill that will allow municipalities to do exactly what you did without any interference from the state that might prohibit those entities such as a municipal government. The question, though, is it applicable across the board? I mean what works in Lafayette doesn't necessarily work in San Antonio, where we probably have 1.3 million people now, and of course AT&T is headquartered there. That is part of the mix. But the question is, you have Cox that provides, I guess, coaxial television, right? Then you have—now who else, AT&T is obviously telephone service, copper, and then you have a Cadillac of all delivery systems, which obviously is fiber optic. They looked at it, and they said, and I think Dr. Darby has alluded to, they look at it as an investment. But wouldn't it be the fact that you were able to do it because it is not a level playing field?

And I am not saying that Mr. Boucher and Mr. Upton's bill is not a good one. I haven't seen it. They are going to explain it to me. I am sure in certain circumstances it makes a lot of sense. It does not make sense obviously that then government would be competing with the private sector, because I think government always has an advantage. Now why did it make sense for Lafayette and didn't make sense to the private sector?

Mr. DUREL. Well, you know, of course the words we use at home is we answer to Main Street, they answer to Wall Street. Once again, we asked them to do it. Why didn't it make sense to them is because obviously they don't feel that they can make enough profit fast enough to justify their investment to Wall Street. We do have that advantage that we can bond things out for 20, 25 years, and we don't have to make a 40 percent profit to justify it. Our profit is how we service our community, and that is how we measure it.

Mr. GONZALEZ. And I understand, and I am not being critical of your effort, I commend it. However, I just don't think that the Lafayette experience necessarily has to be replicated in those areas that are not subject to the same conditions, and as you got copper, you got coaxial, and you want something a lot better, which then leads me to what services do you provide with your fiber optic system?

Mr. DUREL. What we are going to provide—right now we are in the wholesale end of it. We allow some of the larger businesses in Lafayette to get it through our wholesale companies. We are getting into the retail, television, telephone, and Internet.

Mr. GONZALEZ. That is exactly, I guess, my point. You will be getting everything that is available over what we refer to as Internet protocol, and that is voice, that is video, that is data, that is everything. So you are going to be in direct competition then with the telephone company and the cable company. Is there anything about that that is any concern to you as far as a governmental entity in direct competition with these other providers way beyond

what initially was we want more capacity, we want broadband, and I think that probably it was advanced on the notion of data, but now you are in direct competition with voice, right, and television. Anything wrong with that?

Mr. DUREL. Our community didn't think so. Our citizens voted, 62 percent to 38 percent said it is OK. And as I pointed out earlier, it is a very conservative community. And once again had we not gone to the private sector and asked them to do it it may rub a little bit different.

Mr. GONZALEZ. And I understand that.

Mr. DUREL. I don't know what else to say. I mean they had the opportunity to do it. They choose not to. They chose not to bring electricity in the 1890s to a lot of communities in America. Had we not done it, we would not have gotten electricity for 25 or 30 years.

Mr. GONZALEZ. I am from Texas. You don't have to tell me about that, and I understand about co-ops and so on.

Mr. DUREL. I think what we are trying to do in Lafayette that I worry about not happening is I see us raising the bar. I think it is time for America to raise the bar and not try to——

Mr. GONZALEZ. Let me ask you some—there are many moving parts to what you have there. Who built your system? I mean you didn't. You didn't have your engineers——

Mr. DUREL. We had private contractors do it.

Mr. GONZALEZ. All right. And then who do you contract with to maintain it, run it?

Mr. DUREL. A lot of what we would be doing would be kind of a public-private partnership in that you may have somebody like Google running our——

Mr. GONZALEZ. That is going to be my point. You are going to have special contractual relationships with either content people, right?

Mr. DUREL. Right.

Mr. GONZALEZ. Applicators, all of that.

Mr. DUREL. Right.

Mr. GONZALEZ. So you have a governmental entity that establishes the network and then enters into special relationships with other private entities that may be in competition with networks?

Mr. DUREL. Right. That was a good answer. Thank you.

Mr. GONZALEZ. When I answer my own question it is always the best answer. Let me ask you this, because you are a municipality, and because you have these special relationships, and because maybe there may be some advantage that you enjoy as a governmental entity. I don't mind that in certain circumstances. However, as we expand this—now you are not going to be able to provide any service outside of Lafayette. You are restricted to your geographical area, are you not?

Mr. DUREL. In fact, right now we are. It is a city-owned utility, and we provide services only in the city, so yes.

Mr. GONZALEZ. Do you foresee expanding beyond, and would you be able to? Is that your intention?

Mr. DUREL. It is not our intention, but I can tell you this. If our state came to us and said, because quite frankly we do have the license to provide it to anybody in the state that wants it, and they can afford to do it.

Mr. GONZALEZ. OK. Well, let me go from there then. Let me ask you. Would you feel then obligated to follow the following principles: consumers are entitled to access the lawful Internet content of their choice; consumers are entitled to run applications and use services of their choice; consumers are entitled to connect their choice of legal devices that do not harm the network; and consumers are entitled to competition among network providers, application, service providers, and content providers? You are willing to—I think the conflict comes where competition among network providers when you have a governmental entity that has a leg up on the private sector. That is a very serious concern. I am going to talk to Mr. Boucher. I am going to talk to Mr. Upton. In limited circumstances. But I also believe that that which you establish within your geographical boundaries should be limited to that area, because the whole premise was that you were underserved. At this point, once you are no longer underserved and you expand beyond that, the advantage is tremendous.

And I do believe that it is not a fair advantage. I understand the necessity of it. So I am concerned. Much of what we are talking about here actually is contrary to what we were trying to achieve with a Federal franchise regime, which obviously we did not succeed, but we knew we had problems with what the municipalities were doing with their franchises. That is states like the State of Texas were then coming and preempting. So I am not sure we don't have a cousin of that particular problem. I mean I do commend what you did, because you are your city's leader, and you saw a need and you are fulfilling it. I just don't like the idea of you going beyond the original plan and need. I yield back.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from California, Mr. Radanovich.

Mr. RADANOVICH. Thank you, Mr. Chairman, and again thanks for holding this hearing. Mr. Largent, welcome back to Congress. I wish you were here and about 60 others of our friends that are not here anymore. But I do have a question that is relevant to my rural area of the district in California, my neighboring Sierras and Yosemite National Park, and they are pretty rural areas. My question is how would creating a uniform Federal standard or national framework for wireless consumer protection benefit my rural constituents in those areas who use their cell phones on a daily basis? Was it covered? I am sorry. I just came in late.

Mr. SHIMKUS. I am just harassing you.

Mr. LARGENT. Thank you for the question. I think the principal way that it benefits all customers is in keeping the prices so low. As I mentioned, wireless customers in this country are experiencing some of the lowest rates—they are experiencing the lowest rates in the first world, and I would say the lowest rates in the world. And it is because of this uniform set of rules that we have on the industry. And what we are trying to do is extend that uniform set of rules to cover all of our consumer issues that we are talking about here. So I would say that having the rules that we have been under since 1993 has been positive. It has created the competition that we experience today. Competition has worked in a positive way for customers, and we are just trying to extend that to this one other terms and conditions of the '96 Act.

Mr. RADANOVICH. Mr. Largent, on the issue too of siting towers, a lot of—I think there is quite a bit of public lands, BLM, national forest land where siting towers is important. You need more of them in rural areas. And environmental laws I think are laws that get in the way for us to be able to site some of those towers in rural parts of the United States. Do you find that—does it affect the carriers' ability to site towers as part of a consumer protection element in this thing, easier access into those areas and the ability to site those would benefit as well?

Mr. LARGENT. Absolutely. I appreciate the question because it is something that has been a particular thorn in the side for the industry is the ability to site towers in specific areas. And I would tell you as one example the CEO of Verizon Wireless lives in a particular part of New Jersey where he has been trying for 12 years to get a tower sited in his community. It is not a rural community. So we have some issues like that that are very perplexing to us as an industry, and bringing some uniformity to how we can site towers and having a shot clock, for example, on how long we have to wait to site towers would be very helpful for this industry.

It is not just rural districts like you represent, George. It is the entire country. New Jersey is—most of New Jersey is not rural, and it is certainly not rural where this gentleman lives, but we have issues with local municipalities on issues like that all the time.

Mr. RADANOVICH. All right. I appreciate that, Mr. Largent. And I thank my ranking member, Mr. Shimkus, and the chairman. Thank you.

Mr. MARKEY. Thank you. Often times you wind up with a paradox at the most beautiful bucolic communities who have the worst service, but they also then object to having a cell phone tower placed in those communities. It creates a paradox that has always been interesting to observers.

Mr. RADANOVICH. If the gentleman would yield. I would encourage the industry to—they are making great strides in making them look like trees and maybe half dome and things like that, some of these towers.

Mr. MARKEY. He is the CEO. Maybe they could put one in his backyard. It would be so beautiful. It would be a beautiful thing to have right there. So let me turn to recognize the gentleman from Michigan, Mr. Stupak.

Mr. STUPAK. Thank you, Mr. Markey. Why can't he put a tower up? I mean what is the—is it local——

Mr. LARGENT. Right, it is getting the approval from the local municipalities. He can't build a tower. And he probably would put one in his back yard if he could.

Mr. STUPAK. Mr. Durel, let me ask you a question or two. I have a very, very rural district, probably one of the most rural in the United States, one of them. Michigan actually passed a law saying you cannot—municipalities cannot get into it unless no one will bid for services. Before you implemented your system, did you have representations by carriers that they would come in and build a system for you, or would they just ignore your area altogether?

Mr. DUREL. Oh, no, and like I pointed out earlier we have what everybody else has. We just wanted to have something, instead of

a Cadillac, we wanted something supersonic. And we did ask the private sector to do it several times. We had meetings with them. I would be speaking at a Rotary Club, and they would be out in the audience, and I would say do it, we won't do it, so we gave them the opportunity for sure.

Mr. STUPAK. Just never presented the opportunity or they never came forth with a proposal or anything?

Mr. DUREL. They came forth with smoke and mirrors, you know, but they never presented us with anything that was significant.

Mr. STUPAK. That is one of the frustrations we have in Michigan with this law. They are making proposals, and they promise to do it, but it never happens, and the municipality can't get into it. You stated that by 2009, you will begin service of up to 100 megabits per second. How much will Lafayette be charging for this fiber to the home service? What would be your cost for the home customer?

Mr. DUREL. I am glad you asked that because I made a mistake a while ago again. We are going—our starting service will probably be somewhere in the neighborhood of 8 or 10 megabitss per second going both ways.

Mr. STUPAK. OK.

Mr. DUREL. But we are going to give 100 megabits per second peer-to-peer, customer-to-customer for free, so an engineering firm working with one of our geologists can send lots of data very cheap and very fast. And so the 100 megabits per second peer-to-peer is free.

Mr. STUPAK. OK.

Mr. DUREL. But they have to be paying for some level of service first.

Mr. STUPAK. Right. Mr. Gonzalez asked you about all these other services you provide to homeowners. What is the anticipated cost of that per month?

Mr. DUREL. Oh, the basic service, what we would call expanded cable, telephone, and television would be about $85. And it is like I told my community, you will still have available to you less quality for more money.

Mr. STUPAK. OK.

Mr. DUREL. They will still have it.

Mr. STUPAK. And 62 to 38 they passed that?

Mr. DUREL. Yes.

Mr. STUPAK. OK. Why have some, in your opinion, municipal broadband proposals, failed to deliver what Lafayette is delivering?

Mr. DUREL. Well, that is another good question, because I want to make sure we are real clear that when we talk about municipal broadband that covers a whole range of things, wireless and fiber optics. And we heard a lot of that. That was some of the smoke and mirrors that was presented to our community, and we checked on every one that they held up as a failure and never could find one. I guess they would hold them to different standards and that sort of thing that they wouldn't hold the private sector to on a cash flow basis instead of—just kind of using accounting jargon. But from a fiber optics standpoint, we have never been able to find a community providing retail fiber optic services that has failed.

Mr. STUPAK. Did your community—and I am asking all these because based on a lot of these issues in my district—did they see it

as wanting to take hold of this new technology, or was it driven by the business sector that if we didn't have this technology we would be left behind?

Mr. DUREL. I think it is a pretty progressive little town in Louisiana. In fact, we think we have the most progressive city in Louisiana.

Mr. STUPAK. How big is——

Mr. DUREL. The city is about 125,000 people. The parish is about 225,000.

Mr. STUPAK. My biggest city is 30,000.

Mr. DUREL. And so, yeah, it was a business community. I don't know if you were here earlier. We had——

Mr. STUPAK. I have been in and out.

Mr. DUREL. We had every living former chairman of the board of the Chamber of Commerce stand up at our council meetings supporting it. Every single business organization, realtors, home builders, every single business organization in Lafayette stood up in favor of this. We had the Democratic party, the Republican party standing up in favor of this. And it was all about getting Lafayette something to set it apart. It was all about us having something that we couldn't get otherwise, and we had enough people who recognized that what we were going to have was something that could bring us to a whole new level and that could lead America and that would give companies, as I pointed out earlier, this company called Newcom from Canada that located in Lafayette after looking at 200 cities. And when I talked to the president of the company, he said—I asked him, I said we don't even have it yet, why do you talk about it, and why are you here, and he said just because of the fact that Lafayette is holding technology as is an important issue. It tells us it is a place we want to be. So without even having it available on a retail basis, now he was able to get it on a wholesale basis, but anyway we have had many companies that have looked at us, and we have worldwide recognition about our battle, the legal fees that we paid to fight the battles that we had to fight.

By the way, we went all the way to the state Supreme Court to finally get the ability after a 2-year fight, but those are probably the best marketing dollars we could have ever spent. It was great publicity for us.

Mr. STUPAK. In my district: 5 percent that has never been wired. There are parts of my district that don't have phone service. The upper peninsula of Michigan, which is part of my district, the upper peninsula of Michigan economic development and how it improved, they said things, transportation and faster broadband of 100 megabits per second, as you are saying. So it is very interesting what you did there. Thanks. A little bit of time left here.

Mr. MARKEY. There are only 3½ minutes left to go on the House floor, just so you know.

Mr. STUPAK. OK. Mr. Murray, in your testimony you say Consumer Reports' annual customer satisfaction survey ranked cell phone service in 18th place out of 20. How was that data collected? Was Congress in there because they were 21?

Mr. MURRAY. Consumer Reports is actually quite a robust statistical department. We have a full survey team, and the survey research that we are doing is accredited by some universities as valid

social science, so nationally these are not—to be clear, these are Consumer Reports surveys that were done by the magazine side as opposed to——

Mr. STUPAK. You used surveys they did then?

Mr. MURRAY. Right, as opposed to the D.C. office, if that is the question you are asking, sir.

Mr. STUPAK. It is the question I was asking. OK. Do you believe comparing FCC reports to the total number of subscribers gives an accurate description of complaints?

Mr. MURRAY. Do FCC numbers giving——

Mr. STUPAK. Let me ask Mr. Largent this. Steve, in your testimony you indicate that 26 million Americans complain about wireless service, 1.3 million complain about the contracts, but it looked like you compared the numbers or the number of complaints, 26 million, and then 1.3 by FCC, complaints using FCC numbers, not your peers.

Mr. LARGENT. I would just say very quickly that we are not resting on any laurels. We know that we have complaints. We are trying to address them. The more important statistic to me is the fact that 92 percent of the complaints that are lodged are resolved by the carriers themselves. We are fixing our own problem.

Mr. MARKEY. The gentleman from Michigan's time has expired. We have less than 2 minutes to go over to the House floor to make these roll calls. We are fast. We are going to make—I am still recovering from my Achilles rupture, and I don't want to miss the role call. We will reassemble and immediately thereafter but since the Red Sox are on the White House lawn at 3:00, we will adjourn before that time so everyone knows that. We are in a brief recess.

[Recess.]

Mr. MARKEY. The gentleman from Mississippi is recognized for a round of questions.

Mr. PICKERING. Thank you, Mr. Chairman. I commend you for this legislation as one further step to bringing about the Federal framework in communications policy that we have all worked toward over the last 10, 12 years. I guess about 10 years ago we passed legislation to bring uniformity to cellular taxation in all local and state jurisdictions. This would do the same thing, and I think it is very wise and good legislation. Although I do have some concerns and want to see that we do give the clarity and the certainty to the industry and the consistency and the predictability for consumers of knowing what they will face, and I think it can be a win-win both for investment innovation and the companies that are trying to do national businesses, as well as for the consumer knowing that on early termination fees, on transparency, and on calling plans and modifications that we can get the right balance. So I look forward to working on those types of things.

Mr. Durel, I had a question before we broke on the last break. I started thinking about it as we give municipalities the opportunities to do broadband. Let us say somebody comes in after the fact and wants to do a broadband wireless or wireline service but a municipality does not want to give them the siting. Couldn't that be like a barrier to entry or an anti-competitive practice, and would it be wise for us in a balance if we want to promote municipalities having that option if no one shows up, no one will come in, also

making sure that there is a shot clock or certainty of a fair process on siting, because we have very aggressive mandates of buildout in 700, which I think will be great for rural areas and underserved markets and cities like Lafayette, but if municipalities hold up siting we are not going to get those services in many places. Would you mind that type of balance where if we in this bill give that choice and at the same time have a siting process that would be fair and reasonable both to cities and localities, as well as to companies, so that we make sure that we don't have anti-competitive or barriers to entry?

Mr. DUREL. And I want to point out that municipalities already have the ability to do this. It is a question of having legislation that would prevent it from happening, and some states have already done that. But, yeah, I think that there should be something in there to prevent municipalities from saying now that we have done what we have done, that we don't want anybody else to come in here.

Mr. PICKERING. Mr. Murray, you have raised questions about the language in the legislation possibly not being able to predict future consumer needs or what the market is going to be or the protections. In the '96 Act we had the triennial review. If we put something in this legislation that would have say a 5-year review for the FCC to look at what consumer protections may be needed 5 years from now, would that address your concern, and would that be a wise and reasonable way to address that, that we just have that type of review process built into what we do?

Mr. MURRAY. Well, I don't think that that would be as responsive as having people who are closer to the ground, closer to the potential of fraud and abuse be able to address it in an immediately responsive way if the problem arises, and then we have a 5-year cycle before we can say, well, is the FCC doing enough here. You know, the FCC is a great agency, but boy, they have a lot on their plate already, and there are 250 million cell phone subscribers out there. And I am not entirely sure that that is the right place for this to live in its entirety.

Mr. PICKERING. But if we built in some type of review process, would that be helpful?

Mr. MURRAY. I think that if it was a shorter duration certainly then 5 years, maybe a bi-annual review, that would alleviate some of the concerns, but I don't think it addresses it completely.

Mr. PICKERING. Mr. Largent, as you look at the legislation what are the areas that cause—if you had to make 3 proposed changes to give the industry the certainty that it needs to make this investment that we can tighten up the language while maintaining the protections on a federal basis as far as our standards, what would you recommend?

Mr. LARGENT. Well, that is a great question. I think that there are a couple of changes that we would recommend. One is on the enforcement piece, we think that the attorneys general today have the ability to enforce laws of general applicability as it applies to the wireless industry, and we would reinforce that to see that they could enforce those laws that generally apply to all consumers but particularly to consumers in the wireless industry. That would be one piece. Another piece is on Title III where it actually——

Mr. PICKERING. In the legislation do they give that enforcement to the state public service commissions?

Mr. LARGENT. They allow the states to determine how they are going to do that is my understanding.

Mr. PICKERING. And it is done by the attorney general.

Mr. LARGENT. That is right.

Mr. PICKERING. Which would lead to more of a court-legal process than a regulatory process.

Mr. LARGENT. That is right, and I think that that is conducive to actually resolving the problem in the quickest way possible.

Mr. PICKERING. Mr. Chairman, again I would like to follow up and get some language, and if I could just have a few seconds to say later this afternoon I have to go down to the White House with Mr. Markey to celebrate the Red Sox and their great victory. Now you ask why would a Mississippi boy go to a Red Sox celebration? It is because it is a Mississippi pitcher, Papelbon, who is their closer, and if they had a Mississippi quarterback like the New York Giants, they would have won the World Series. Thank you, Mr. Chairman. With that, I yield back.

Mr. MARKEY. Thank you. To be more specific, he is talking about Jonathan Papelbon and Eli Manning, both sons of Mississippi. So we are—I want to tell you, Mr. Durel, that your staff has notified us that you are on a 2:00 flight. It is now 1:00, and you are going to Washington National, so I think you can make it even if we do so after we recognize Mr. Boucher for his round of questions. So at the conclusion of that, you will be free to leave.

Mr. DUREL. As of now, I may not have a 2:00 flight. We are working on it.

Mr. MARKEY. You will make it.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman, and Mr. Durel and other distinguished witnesses, welcome. Thank you for sharing your testimony with us today. I am going to try to be very brief. I just have a couple of points that I would like to make. First of all, I want to acknowledge, as others have, the presence in the draft legislation of the title that would empower municipalities across the country to offer broadband services, and I want to thank Chairman Markey for making that provision which I introduced in partnership with Mr. Upton a part of the draft legislation.

Mr. Durel, I was very impressed with your testimony. I want to thank you for the way in which you prepared it and the power with which you delivered it. I can't resist taking this opportunity to respond briefly to the comments made by my friend and colleague from Texas, Mr. Gonzalez. He expressed concern about making sure that when municipal systems are in fact deployed that there is no discrimination by the municipality in favor of the municipal system to the disadvantage of a private sector competitor, and I would point to Section 202 of our draft that basically provides the following, that says that a public provider shall not grant any regulatory preference to itself or to any provider of advanced communications capability or service that it owns or with which it is affiliated.

The second provision says that it shall not apply its ordinances, rules, and policies in a way that discriminates in favor of any provider of the service, itself included. I have the same concern that

Mr. Gonzalez had at the time we drafted this provision, and so we put this section in in order to make sure that the playing ground in fact would be level. And I would assume, Mr. Durel, that your municipality has no problem in complying with these kinds of safeguards?

Mr. DUREL. Absolutely not.

Mr. BOUCHER. That is very good. You can go get on your plane as far as I am concerned. Thank you very much for being with us today. Mr. Chairman, maybe with your permission, we could excuse him.

Mr. MARKEY. You are excused, but let me note this if I may. Congressman, there is no such thing as a congressional expert. We are only experts compared to other congressmen on subjects, not compared to real experts on subjects. There is only one subject that we are really experts on, and that is getting re-elected. And I might say this to you as a very conservative Republican, I think all of us are of the opinion that you are going to have no problems at getting re-elected in Lafayette, Louisiana. Thank you so much for your willingness to appear before us today.

Mr. BOUCHER. Mr. Chairman, let me just comment briefly on that section of the legislation that relates to the regulation of wireless services. And I very much support the direction in which that title of the draft moves us. In fact, several years ago I joined with Mr. Inslee and also Ms. Blackburn in offering an amendment that had very similar content to the then pending legislation, which was a telecom bill addressing a different subject. And the ruling was that our amendment, whatever its merits, was not germane to the then pending bill, so we withdrew that with statements that we hoped the day would come in the near future when we could return to that subject and address it in a more complete way. And I am delighted that that day has now arrived, because I think it is hard to imagine a market that is better suited to complete Federal regulation and total preemption of state regulation than the inherently mobile wireless market, where you could have a person resident in one state with a telephone number that is in a zip code for another state traveling all across the country, and who is to say what state regulation would better suit that individual person.

I can't imagine a situation better tailored to total Federal regulation and complete preemption of state regulations than this. So I am very pleased that the time has arrived where we can have a discussion about how to do that. I will just offer my view. I think the right formula is to say rigorous Federal standards so that they are meaningful and so that they offer the kinds of consumer protection and service quality standards that really are necessary. And it is hard for me to imagine a Federal standard too rigorous for me to say is appropriate, and so I think it needs to be very rigorous.

But in return for that fully rigorous Federal standard, we need to have complete state preemption, and if I have a fault of this draft, it is that it leaves the door open for continued state regulation even when a rigorous Federal standard is put in place, and so I think as drafted it doesn't fully meet the purpose for which I would certainly like to see it applied. Now I also think that in return for rigorous Federal standards and complete state preemption there ought to be rigorous enforcement, and so I am not offended

at all by the provision in the bill that says that state attorneys general, that state public service authorities ought to have the opportunity coincident with Federal enforcement to also enforce these Federal standards.

And we have that as an aspect of federalism across a whole range of statutes, both regulatory and criminal. And so I don't have any problem with that dual level of state and Federal enforcement. So, Mr. Largent, let me just put my single question of the afternoon to you, and that is this. If we can achieve that balance where we have complete state preemption but we have a rigorous Federal standard and I know you would have some discussion about what ought to be in that Federal standard, but let us assume for purposes of this question that you are satisfied with what that federal standard is, and that remains to be discussed. In return for that and the complete state preemption that your industry would receive, would you be willing to accept the dual level of enforcement with the states being able to enforce through AGs and PUCs coincident with the Federal enforcement at the same time?

Mr. LARGENT. I would say, Mr. Boucher, I was applauding you all the way up until the very end, but I would say this, that we would applaud your entire statement as long as the enforcement was uniform. We don't care who is enforcing it as long as what they are enforcing is uniform. The problem is when you start getting different layers of enforcement, so if we can say that we got one standard that we are adhering to, and if you don't meet that standard it is going to be enforced, and we don't care who enforces it, whether it is the FCC or PUC in a state, but we want the enforcement to be uniform.

Mr. BOUCHER. I don't object to that qualification, but let me just make this point. The reason I think it is important that the states have some enforcement authority is that there are limited Federal resources that can be devoted to enforcement, whether that is at the Federal Trade Commission or at the FCC or at DOJ or somewhere else, and it is possible to imagine a broad range of consumer problems that could arise under a rigorous Federal standard, and when a complaint is filed at the FCC it takes 3 years to adjudicate it. That is not an avenue for relief for that particular consumer. So my view is there really is a role for state enforcement. Now I agree with you. It ought to be uniform to the extent that the state and the Federal authorities are enforcing the same standard. That would be a well enunciated Federal standard that is clearly defined, and everyone understands that it is, but as long as that is met, it just seems to me that the state role is important in this equation.

Mr. LARGENT. I agree with you.

Mr. BOUCHER. OK. Excellent. Thank you, Mr. Largent. Thank you, Mr. Chairman.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Oregon, Mr. Walden.

Mr. WALDEN. You know, Mr. Chairman, if I could for the moment, I know Mr. Buyer needs to go over to the Senate side to speak to a group of veterans, and so I would like to pass at this point and yield—not yield to him but pass and then come back.

Mr. MARKEY. We can do that. We will recognize the gentleman from Indiana.

Mr. BUYER. I ask unanimous consent to participate in the questioning of the witnesses.

Mr. MARKEY. Without objection, the gentleman is recognized.

Mr. BUYER. I thank the gentleman. One, Mr. Largent, if you know, what percentage of wireless consumers actually ever pay early termination fees?

Mr. LARGENT. I don't know the exact statistic, but it would be a fraction, 1 or 2 or 3 percent total.

Mr. BUYER. All right. I am not officially back on the subcommittee but will be in the very near future, so I look forward to working with Mr. Markey. One thing that does concern me, I read your statement and embraced what you wrote on page 11 of your statement when you talked about only 26 wireless consumers per million have complaints about their wireless service, and this is the most recent data that was released to the FCC. Now when I look at questions like this, I have to put it—if I am going to make judgments and it is based on principle-oriented decision making, I have to put it into a matrix that says, all right, if we are going to do some form of consumer protection, what will be its impact upon liberty, will we continue to be able to promote economic opportunity, are we going to be enhancing high standards while at the same time we have with regard to these devices, we have speech, we have—we have freedom of speech, freedom of expression, freedom of association?

Yes, the courts have allowed legislatures and congresses to act on consumer protections, but in this case, I look and say how are industries doing policing themselves? And I look at this—now if you say here you have got 26 per million, I will go to my congressional district. If I have got now, the growth of my congressional district——

Mr. MARKEY. How about this room?

Mr. BUYER. If I have 750,000 in my congressional district, if I use the same ratio that means I have only got about 19 people would be complaining about me. Boy, that is pretty sweet. That is a great correlation, but is it unrealistic? But as I look at that, I go, wow, that is an industry that is doing pretty well if you got 26 per million and your trend line is going down as your prices are going down and the cost per minutes are going down. And if the competition is there and increases, all it does is place more pressure on you to do your job well, otherwise, people are going to go somewhere else. And so I look at this and say I embrace Mr. Markey's sincerity. I have never judged it.

But if there is ever a moment where we need to be cautious, it may be now and be very careful in what we do. Now in Indiana I advocated and worked with the governor, and we wiped out a lot of these regulations in Indiana, and we have done that so of all the states out there Indiana, my gosh, you can freelance. It is the wild west out there with regard to the technological renaissance. And if I am worried about the impact upon liberty, then I am deeply concerned about increased regulation at a time when the industry seems to be doing really well. And take, for example, we allow the

press. Right? The press pleases itself. We don't get into the censorship.

We say you have got your codes of ethics, and we can debate whether they actually enforce their codes of ethics or not. I would submit they don't do it very well, but if you have got your code and you place demands upon your members and your results are pretty strong, then one of my colleagues talked about all these complaints. Well, all these complaints, does that mean the 26 of all these complaints? So is there a boogey man in the closet? Are they under the bed? I don't know. My concern is that we better be walking cautiously here. That is just my impression. Mr. Largent, do you have any comment?

Mr. LARGENT. And I share your concerns, but our problem is it is not the Federal regulation that we are feeling nipping at our heels today. It is the state regulation, and that is what this particular bill addresses is where there are 20 states right now that introduced over 400 bills to regulate the wireless industry on terms and conditions, and under just that nomenclature, the terms and conditions, the contract terms and conditions, we have 1.3 complaints per million subscribers.

Mr. BUYER. I concur with all of that. When I say walk cautiously, we can say we are going to do Federal preemption, yet we are going to allow all these state AGs to go out and set their own standards and losses.

Mr. MARKEY. The gentleman's time has expired. The chair recognizes the gentleman from Oregon, Mr. Walden.

Mr. WALDEN. Thank you very much, Mr. Chairman. I appreciated this hearing. Mr. Largent, I want to go through as I was reading through this section-by-section on this legislation just some of the issues that come up as they are described, and perhaps you can help me better understand what is being proposed here. I know in Section 101 it talks about disclosure of roaming charges, and I understand roaming charges. My question is, as mobile as people are, if I go into a cell provider how easy is it for them to disclose all the different roaming charges? Is that an issue that we need to have any concern about?

Mr. LARGENT. No, it is not an issue. It is part of our consumer code already.

Mr. WALDEN. Then in Section 103 it talks about the maps must factor in topographic and other variables and impact service availability and identify limitations in the reliability of the maps. Now I had several of my colleagues here talking about the size and scope of their districts. Mine is 70,000 square miles, which stretches from the Maryland shores to Ohio. I was just out traveling 1,124 miles in 8 counties over 5 days. A lot of that area has no coverage. Some of it has coverage, but it depends upon the contours. Do you have any concerns that the maps that you are going to be required to produce here can accurately be done, or do they do a Longley-Rice standard? What standard will be used to look at shadowing and everything else?

Mr. LARGENT. Well, the problem is that the maps are changing on a regular basis.

Mr. WALDEN. Right.

Mr. LARGENT. And the biggest problem that that presents is to our smaller carriers, to our mid-size and small carriers who don't have maps that are on the Internet, that have physical maps that they are having to replicate or redo on a regular basis as they build new towers. Our larger carriers all have their maps on the Internet. They are pretty adjustable for that.

Mr. WALDEN. Right, but when this is put in statute and you are required to have them, does that open up for some sort of penalty phase? Is there a private right of action in here if I have a cell phone and determine while I am driving out in the mountainous country I don't get service and your map shows I would, but because I drop down into one valley and out, how specific do these maps have to be?

Mr. LARGENT. Well, that would be subject to the legislation, and I am not sure what the specificity would be, but we have a code that we follow, the CTIA consumer code for wireless services that requires mapping. And my concern on this particular provision is requiring our carriers to put their maps on the Internet, and all of our companies are not big enough to have maps on the Internet because they are so small, and that would be one thing that I think would be an exception to this particular bill.

Mr. WALDEN. OK. Let me go to Section 104, which deals with the charges that can or cannot be disclosed. And I have been reading through the summary of the section, and I am trying to figure out what we are really getting at here. Does that preclude you from listing specific charges?

Mr. LARGENT. Yes, it would.

Mr. WALDEN. And which charges would those be?

Mr. LARGENT. It would be the charges are billed under regulatory fees, and that would be charges that carriers incur for having to deduct from their customer's bills for various regulations, so that state, local, as well as Federal regulations on E-911, CALEA, universal service——

Mr. WALDEN. So I as a consumer wouldn't know what those charges are because you would be precluded from detailing those specifically on my bill?

Mr. LARGENT. What I am talking about specifically is the charge that is incurred to the carrier to actually deal with all those fees.

Mr. WALDEN. Right.

Mr. LARGENT. So, in other words, I don't think there is anything in the bill that precludes a carrier from putting on the actual charge that you have to pay for universal service or E-911. You can put that on the bill. But what we are saying is there is actually a cost to the carrier to have to deal, juggle all those balls before he puts out a bill, and that is the charge that is often put on, 70 cents per month or whatever that is on a customer's billing. That would not be allowed.

Mr. WALDEN. You couldn't charge that or you couldn't disclose that?

Mr. LARGENT. You couldn't disclose that.

Mr. WALDEN. I would still be paying it. I just wouldn't know why.

Mr. LARGENT. That is exactly right.

Mr. MURRAY. But the difference is you would have that number up front when you buy service rather than it being a charge that pads the bill. Let us be clear. E-911, cost of compliance for that, that can be explicitly on the bill.

Mr. WALDEN. I have been in and out of different cell carriers, and I know this bill does some good things to say we are going to make this a lot clearer for consumers to understand, but once you have signed up you have long forgotten what was in that small print, but when I get that bill every month it is kind of nice to know the specifics. I am just trying to figure out why we would put in the law that they can't put something like that on their bill. What is the justification?

Mr. MURRAY. So the idea is, number 1, any charge that is authorized by a government so E-911, that is on the bill, no problem. What we don't want to see on the bill is the administrative overhead for that, the bottom line padding, but what it allows——

Mr. WALDEN. Why not? Why wouldn't you want to disclose that?

Mr. MURRAY. Well, because what the carriers are doing is they advertise, for instance, you can get a product for $50 a month.

Mr. WALDEN. All right.

Mr. MURRAY. And then so you say, oh, I got $50 a month. At the end of the month the bill comes back and it looks more like $75, $80 because there are all these mystery fees that pop up.

Mr. WALDEN. I see what you are saying.

Mr. MURRAY. All I am saying is if there is going to be an all-in price that is going to include some overhead, some administrative overhead, let us just tell consumers up front, that is all.

Mr. MARKEY. The gentleman's time has expired.

Mr. WALDEN. Thank you, Mr. Chairman.

Mr. MARKEY. All time for this hearing has expired. I apologize to all of you. I wanted to give you each time for a concluding statement, but this constant series of roll calls on the House floor will make that impossible. We are obviously interested in working with each of you and all other parties interested in this legislation. We thank you for your participation today. This hearing is adjourned.

[Whereupon, at 1:26 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

STATEMENT OF HON. JOHN D. DINGELL

Today the Subcommittee will receive testimony on a draft version of the Wireless Consumer Protection and Consumer Broadband Empowerment Act of 2008. I look forward to working with Chairman Markey, who developed this draft, and my colleagues on both sides of the aisle to seek consensus on its overarching goals.

This draft legislation addresses three important topics. The first concerns consumer protection and the regulatory structure of the wireless industry. I am mindful that much has changed since 1993, when Congress established the current regulatory regime for wireless services. Since that time, and with increased competition, consumers have enthusiastically adopted wireless devices. According to the Washington Post, cell phones have spread across the globe faster than any technology in history. There are now 3 billion phones in use globally and about 243 million wireless devices in the United States.

This impressive growth, however, has been accompanied by an increasing number of consumer complaints about confusing or unfair contract terms, an inability to change providers because of early termination fees, poor service coverage, and other failings. These complaints, in turn, have prompted some States to pass or seek to pass legislation to remedy these problems. The wireless industry is then faced with

regulatory requirements that vary by State. Sometimes these State requirements even conflict with each other.

The draft bill's solution is to establish a strong set of Federal consumer protections and to preempt State efforts to regulate the wireless industry. I am mindful that for Federal preemption in this instance to be meaningful, it must represent not only a floor, but also true preemption of inconsistent State regulation. Thus, a national framework must provide not only meaningful and enforceable consumer protections, but also preemption that is structured to give wireless carriers more certainty in their business.

Striking the right balance between protecting consumers and providing the industry with a more manageable regulatory structure will not be easy. This Committee carefully established the current regulatory framework for the wireless industry, and precluding a State from protecting its citizens is never a simple matter. However, many wireless carriers operate national businesses, and it is possible that consumers could stand to gain from a more Federalized regime. This bill represents the starting point of this process. My focus as we move forward will be to ensure that consumers remain protected under any regime that we may develop.

Second, the draft legislation addresses the abilities of towns and cities to build their own broadband networks. This piece of the draft legislation is a bill introduced by Mr. Boucher and Mr. Upton, and I commend Chairman Markey for including it here. Some States have passed legislation that prohibits a town or city from building networks, even when the residents of those towns or cities are not served by a single private broadband provider. The draft bill would preempt those State laws, thereby promoting broadband deployment. As I have said before, I believe that if cities or towns are not adequately served by private sector networks, they should not be hindered in their ability to build their own advanced networks. It makes little sense to me that we should keep broadband from those who need it most. So long as all broadband providers are treated fairly, I would hope to quickly reach consensus on this issue.

Finally, the draft legislation seeks to make the Federal Government's use of spectrum more efficient by requiring the use of the latest technologies. This is a laudable objective that, if achieved, could provide Government users with the best available technologies and potentially make more spectrum available for commercial use. I look forward to hearing more about this aspect of the legislation.

Tackling these difficult issues this year will require cooperation and consensus not only across the aisle, but also among wireless carriers, States, consumer groups, and others. I appreciate Chairman Markey's initiating discussion by circulating the staff discussion draft. Much work remains to be done, but I look forward to working with all interested parties to craft a solution that will enhance the protection of consumers while lending certainty to the wireless industry.

STATEMENT OF HON. ELIOT ENGEL

Chairman Markey, Ranking Member Stearns—

I would like to thank you for holding this hearing today. In my 19 years in Congress, I have been one of the biggest supporters of consumer rights, and I am glad to see this legislation come up today. Clarifying consumer rights in the wireless industry is something that consumers and providers can all support. And I thank CTIA as well as consumer groups for coming here today.

The wireless industry is a remarkable success story. When I came to Congress in 1989, the idea that cell phones would be so ubiquitous was laughable. But now, I and just about everybody else in this building carries a cell phone and a blackberry everywhere we go.

This success can not only be traced to the demand in the market. The Congress helped this process by not over-regulating the wireless industry. And this committee should get a lot of credit for that. A tremendous job was done by both parties of balancing the rights of consumers with the good of the marketplace. And while this is a good piece of legislation that we are discussing today, I want to ensure that we continue to walk that balance.

Currently, the FCC can regulate pricing of wireless plans, while states can regulate the terms and conditions of the plans. And this means that one state can regulate what can be on a wireless bill, another can mandate the size and type of the font, and another can regulate the early termination fee. Unfortunately, this has the potential to quickly turn into a patchwork of 50 different sets of regulations. Mr. Chairman, I applaud you for bringing up this legislation. This legislation would work to end this patchwork and create one strong national standard that consumers and providers can appreciate.

We should be careful, however. I think everybody here is interested in passing a consensus bill that all sides support. But if we allow a great deal of leeway in the legislation to allow states to continue to create many new rules and regulations, we risk losing the consensus that this bill has the potential to create.

I also strongly support the municipal broadband provisions of this legislation. A number of municipalities have begun to roll out broadband internet access, only to be stymied by state legislation preventing the rollout.

Universal broadband is an excellent target that this nation should shoot towards. Broadband can bring additional commerce to an area, it can bring better health care at lower cost, and it can bring multimedia presentations and new learning opportunities to students that currently lack them. We should not stand in the way of cities that want to provide broadband to their citizens. So I strongly support the provisions in this legislation to allow cities to propagate broadband access.

Finally, I appreciate the goal of this legislation to streamline the spectrum to make room for new technologies and services. As we all know, the spectrum is simply running out of room. But with new smart radio technologies, we can more efficiently use the spectrum that is currently being utilized. By freeing up space on the spectrum, we can allocate more space for public safety or put it up for auction as we are currently doing with the 700 megahertz portion of the spectrum.

Mr. Chairman, I again want to say that I appreciate this legislation, and I look forward to working with you to make it even stronger for all sides. I yield back the balance of my time.

STATEMENT OF HON. ANNA G. ESHOO

Thank you Mr. Chairman, for holding today's hearing.

While I believe that comprehensive consumer protections are necessary for wireless services, I'm concerned that comprehensive preemption could undermine current California law. California has led the nation in seeking to address the problems that plague many wireless customers, and our laws in this area continue to evolve. I think it would be a mistake for Congress to step in with a heavy hand and pull the plug on this process.

The bill preempts state laws that are inconsistent with the bill and correctly places the burden on wireless carriers to demonstrate to the FCC that state laws are inconsistent with this bill. I'm concerned about the effect of this provision on current California law and the uncertainty it could create on how to determine which laws are consistent and which laws are not, which could lead to protracted litigation in Federal courts.

It is clear that this Subcommittee should be reviewing wireless consumer protection legislation, considering that wireless service ranks near the bottom of Consumer Reports' annual consumer satisfaction survey. Consumers are concerned about rising prices for service, early termination fees, and poor service coverage. I will continue to review this legislation and look forward to working with the Subcommittee on it.

Thank you Mr. Chairman for holding this hearing and drafting this legislation.

STATEMENT OF HON. LOIS CAPPS

Mr. Chairman, thank you for holding this hearing. I have certainly heard from my constituents regarding their experiences as consumers of wireless products and look forward to the testimony here today.

I would like to first say that I am encouraged by the collaboration on these issues between Congress, the wireless industry, and consumer groups.

As technology continues to evolve at incredible speeds, we must rely on each other to further maximize consumer benefit of the public spectrum.

The large shift in consumer reliance on wireless services has resulted in the need to reconsider what constitutes an adequate regulatory regime but also what constitutes adequate consumer protections.

Moving forward, we must consider that consumer mobility performs an important function in promoting free market competition and that full and appropriate consumer disclosure is paramount to ensuring that that competition is fair.

Like the Chairman, I believe that, working together, there are effective ways to address these concerns.

I look forward to the testimony and to further discussion of this draft legislation.

Thank you again to Chairman Markey and to our witnesses here today.

CTIA
The Wireless Association®

Steve Largent
President/CEO

Expanding the Wireless Frontier

March 27, 2008

The Honorable John Dingell
Chairman
House Committee on Energy & Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Re: Questions for the Record of the February 27, 2008 hearing before the Subcommittee on Telecommunications & the Internet

Dear Chairman Dingell:

Attached, please find my written responses to questions posed for the record for the hearing on "H.R. ___, a Discussion Draft on Wireless Consumer Protection and Community Broadband Empowerment," held February 27, 2008 before the Subcommittee on Telecommunications & the Internet. I appreciate having had the opportunity to appear as a witness on behalf of CTIA – The Wireless Association®.

I hope my answers will prove helpful to the Subcommittee as it builds a record on these issues. As always, if there is anything I can do to assist you and the Committee's membership, please do not hesitate to ask.

Sincerely,

Steve Largent

Steve Largent

cc: The Hon. Joe Barton, Ranking Member
Committee on Energy & Commerce

The Hon. Edward Markey, Chairman
Subcommittee on Telecommunications & the Internet

The Hon. Cliff Stearns, Ranking Member
Subcommittee on Telecommunications & the Internet

The Hon. Heather Wilson, Member
Subcommittee on Telecommunications & the Internet

Mr. Phil Murphy, Clerk
Subcommittee on Telecommunications & the Internet

Responses of Steve Largent, CTIA – The Wireless Association®, to questions posed by the Hon. Heather Wilson

1. **Has the Federal government allocated sufficient spectrum for commercial wireless service to meet our needs today and down the road?**

As the wireless industry grows, the industry's need for access to spectrum will grow too. The time to begin the process of making additional spectrum available for commercial use is before carriers are constrained in their ability to meet consumers' increasing demand for the kind of capacity-intensive services and devices that 3G and 4G technologies make possible.

At present, the United States has allocated 294 MHz of spectrum for commercial wireless. This 294 MHz includes the advanced wireless service (AWS) spectrum and the recently auctioned 700 MHz spectrum; neither of these allocations has been made fully available for use by CMRS providers. Of other markets that combine with the U.S. to make up the ten largest among the OECD's membership, six (each of which is substantially smaller than the U.S.) have allocated more than 305 MHz of spectrum for commercial wireless service. Only Canada, Mexico, and South Korea have allocated less spectrum for commercial use, and those three countries combined have less than half as many subscribers as there are in the U.S. marketplace.

When market size is normalized (by evaluating the number of subscribers per MHz of spectrum allocated for commercial service), the data shows that U.S. carriers are substantially more efficient in the way they use spectrum. U.S. carriers serve an average of more than 827,000 subscribers per MHz of spectrum. This is more than 300,000 subscribers per MHz than is the case in Mexico (the country that is closest to the U.S. in terms of spectral efficiency), and almost three times more than is the norm in Europe or Japan. While the efficiency of U.S. carriers is admirable, spectral efficiency cannot serve as a long-term substitute for additional spectrum, especially as consumers are looking to wireless as a tool for ubiquitous, always-on broadband access. As a matter of competitiveness, the United States needs to identify additional spectrum that can be made available for commercial wireless service within the next five years.

Absent a Federal commitment to make additional spectrum available for commercial use, carriers in need of additional spectrum will be forced to look to consolidation as a means for acquiring that spectrum. While consolidation may help carriers to achieve economies of scale that allow them to better serve consumers, mergers should not be the only path to acquiring additional spectrum.

Finally, as wireless becomes an even more integral part of the fabric of U.S. consumers' lives, policymakers should resist calls by special interests to "target" spectrum for specific technologies or business plans. Instead, allocations should be made on the basis of "flexible use" principles that will allow auction winners to make final decisions regarding technology choice, business plan, and deployment schedules.

Responses of Steve Largent, CTIA – The Wireless Association®, to questions posed by the Hon. Heather Wilson

1. **As I understand it, the City of Albuquerque has imposed a moratorium on the construction of new cell phone towers. Have your members encountered similar problems in other locations, and how big a problem generally is tower siting?**

The City of Albuquerque imposed a complete moratorium on tower construction in April 2007. It is CTIA's understanding that, as a result of the open-ended nature of the moratorium, several carriers have cancelled plans for facilities-deployment in the Albuquerque area. These companies have chosen to direct their network investment dollars to other markets.

CTIA is concerned about tower siting for three reasons. First, the aggressive and unprecedented "use it or lose it" build-out mandate incorporated in the 700 MHz service rules means that carriers that won licenses in Auction 73 will need to be able to site and build facilities quickly or risk losing that spectrum. CTIA believes it is unfair for carriers to face potential forfeitures if delays related to the tower siting process are to blame for deployment delays. Second, the success of the WARN Act, as well as carriers' ability to provide reliable coverage to public safety officials who often rely on commercial networks, depends on carriers' ability to provide gap-free coverage. And third, after price, the issue most important to consumers is coverage. Reliable coverage can only be achieved when carriers have the ability to site towers where and when they are needed.

The full value of existing and future allocations of spectrum can be maximized only when carriers have the ability to deploy the facilities they need to serve consumers. As I noted in my written testimony, tower siting continues to pose challenges for the industry in locations from Belfast, Maine to San Diego, California, and too many places in between. While many siting applications are approved without significant delay, every carrier has "horror stories" involving applications that have languished for years, denials without explanations, and other process-oriented problems that combine to frustrate carriers' ability to provide the ubiquitous, gap-free service that consumers want.

CTIA urges the Committee to consider improvements that could be made to the tower siting process. CTIA believes the tower siting process could be improved substantially by:

- requiring that applications be considered within a reasonable time frame;
- requiring that denials be explained in writing (so that carriers can seek to remedy any deficiencies); and
- by expressly permitting the collocation of facilities on existing towers or other structures without the need for local zoning approval.

○